Office - Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS,
CLERK

3

No. 84-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

vs.

STATE BAR OF MICHIGAN, a
Public Body Corporate,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM
AND
APPENDIX

BUSHNELL, GAGE, DOCTOROFF & REIZEN
GEORGE E. BUSHNELL, JR.
(Counsel of Record)
JOHN K. PARKER
3000 Town Center, Suite 1500
Southfield, Michigan 48075
(313) 444-4848

THE INLAND PRESS, DETROIT, MICHIGAN

103pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ..... ii-v

Statement of The Case 1-12

The Court's Jurisdiction 12-19

A. The Matter Is Not Within The Court's Appellate Jurisdiction Conferred By 28 U.S.C. § 1257(2) 12

B. Justiciability 12-19

C. The Matter Has Not Been Presented In Timely Fashion 19

The Federal Question Is Not Substantial 19-24

Prayer For Dismissal Or Affirmation. 25

Index to Appendix ..... I-II

Appendix 16-67b

TABLE OF AUTHORITIES

Cases: *Page*

Allen v *Wright*, 104 S.Ct. 3315 (1984) ..... 13 & n.20, 16
Abood v *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) ..2, 7 & n.16, 10 n.18, 20, 21, 24
Baker v *Carr*, 369 U.S. 186 (1962) 16
Bateman v *Arizonia*, 429 U.S. 1302 (1976) 13
Bates v *State Bar of Ariz.*, 433 U.S. 350 (1977) 23
Bellotti v *Connolly*, 103 S.Ct. 1510 (1983) 12
Bivens v *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) 5 n.12
Brotherhood of Railway & Steamship Clerks v *Allen*, 373 U.S. 113 (1963) 21
Calder v *Jones*, 104 S.Ct. 1482 (1984) 12 n.19
Carlson v *Green*, 466 U.S. 14 (1980) 5 n.12
Charleston Fed. Sav. & Loan Ass'n v *Alderson*, 324 U.S. 182 (1945) 12 n.19
Chicago & Grand Trunk R.R. v *Wellman*, 143 U.S. 339 (1892) 13, 15
Clark v *Washington*, 366 F.2d 678 (9th Cir. 1966) 14 n.21
Crowell v *Randell*, 10 Pet. 368 (1836) 5 n.11
Davis v *Passman*, 442 U.S. 228 (1979) 5 n.12
Doremus v *Board of Educ.*, 342 U.S. 429 (1952) 13
Duke Power Co. v *Carolina Envtl. Study Group*, 438 U.S. 59 (1978) 18
Ellis v *Brotherhood of Railway, Airline & Steamship Clerks*, 104 S.Ct. 1883 (1984) .....2, 7 & n.16, 17 n.22, 20, 21, 22, 24
Ex Parte Young, 209 U.S. 123 (1908) 14 n.21
Falk v *State Bar (I)*, 411 Mich. 63,305 N.W.2d 201 (1981) ..... *passim*
Falk v *State Bar (II)*, 418 Mich. 270,342 N.W.2d 504 (1983) ..... *passim*
Flast v *Cohen*, 392 U.S. 83 (1968) 13 n.20, 16
Goldfarb v *Virginia State Bar*, 421 U.S. 773 (1975) 23
Goldwater v *Carter*, 444 U.S. 996 (1979) 13

Page

GTE Sylvania Inc. v *Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980) 16
Hanson v *Denckla*, 375 U.S. 235 (1958) 12 n.19
Harris County Comm'rs Court v *Moore*, 420 U.S. 77 (1975) 18 n.24
Harrison v *NAACP*, 360 U.S. 167 (1959) 18
Hayburn's Case, 2 Dall. 409 (1792) 12
Hoover v *Ronwin*, 104 S.Ct. 1989 (1984) 23
In Re Hague, 412 Mich. 532, 315 N.W.2d 524 (1982) 7 n.15
In Re Huff, 352 Mich. 402, 91 N.W.2d 613 (1958) 7 n.15
In Re Probert, 411 Mich. 210, 308 N.W.2d 773 (1981) ...7 n.15
Kulko v *Superior Court*, 436 U.S. 84 (1978) 12 n.19
Landry v *Boyle*, 393 U.S. 220 (1967) 19
Lathrop v *Donohue*, 367 U.S. 820 (1961) 10 n.18, 12 n.19, 17 n.22, 20, 22
Record, *Lathrop* v *Donohue* (Orig. Complaint, Wisc. Cir. Ct., Dade County, dd. June 9, 1959) 12 n.19
Louis v *Supreme Court of Nev.*, 490 F. Supp. 1174 (D. Nev. 1980) 14 n.21, 18 n.25
Marbury v *Madison*, 1 Cranch 137 (1803) 13
McKeesport Area Sch. Dist. v *Pennsylvania Dep't of Educ.*, 446 U.S. 970 (1980) 5 n.11
Muskrat v *United States*, 219 U.S. 346 (1911) 13 n.20
NAACP v *Alabama ex. rel. Patterson*, 357 U.S. 449 (1958) 20
O'Connor v *Nevada*, 507 F. Supp. 546 (D. Nev. 1981) ... 14 n.21
O'Shea v *Littleton*, 414 U.S. 488 (1974) 13 n.20, 16
Pittsburgh Towing Co. v *Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966) 19
Princeton University v *Schmid*, 455 U.S. 100 (1982) ...13 n.20, 15, 17
Prune Yard Shopping Center v *Robins*, 447 U.S. 74 (1980) 10 n.18
Quilloin v *Walcott*, 434 U.S. 246 (1978) 4 n.9

Page

Richmond Newspapers, Inc. v *Virginia*, 448 U.S. 555 (1980) 12 n.19
Robinson v *New Jersey*, No. 82-5698, slip. op. (3d Cir. Aug. 6, 1984) 22 n.26
Romany v *Colegio de Abogados*, No. 83-1586, slip. op. (1st Cir. Aug. 23, 1984), *vacating, Schneider* v *Colegio de Abogados*, 565 F. Supp. 963 (D. P.R. 1983) 18 n.22
Silkwood v *Kerr-McGee Corp.*, 104 S.Ct. 615 (1984) 12 n.19
Socialist Labor Party v *Gilligan*, 406 U.S. 583 (1972) 17
Supreme Court of Va. v *Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980) 14 n.21
United Public Workers v *Mitchell*, 330 U.S. 75 (1947) .. 13 n.20
Valley Forge College v *Americans United for Separation of Church & State*, 454 U.S. 464 (1982) 13 n.20, 15
Warth v *Seldin*, 422 U.S. 490 (1975) 15, 18
West Virginia State Bd. of Educ. v *Barnette*, 319 U.S. 624 (1943) 10 n.18
Williams v *Zbaraz*, 448 U.S. 358 (1980) 17
Wooley v *Maynard*, 430 U.S. 705 (1977) 10 n.18

Constitutional Provisions, Statutes and Rules:

U.S. Const. Art. III, §2 ..... 13, 15, 16, 17 n.22
U.S. Const. Amend. I ..... *passim*
U.S. Const. Amend. XI 14 n.21

28 U.S.C. §1257 (1982) 17 n.23
28 U.S.C. §1257(2) (1982) 12
28 U.S.C. §1257(3) (1982) 12
28 U.S.C. §1331 (1982) 5 n.12
28 U.S.C. §2101(c) (1982) 19
28 U.S.C. §2103 (1982) 12
42 U.S.C. §1983 (1982) 5, 14 n.21

Page

Mich. Comp. Laws §600.215 (1979) 6 n.15
Mich. Comp. Laws §600.219 (1979) 6 n.15
Mich. Comp. Laws §600.901 (1979) 1 n.1, 2 n.3
Mich. Comp. Laws §600.904 (1979) 1 n.1, 2 n.3
1935 Mich. Pub. Acts 58 ..... 1 n.1
1947 Mich. Pub. Acts 34 ..... 1 n.1
1962 Mich. Pub. Acts 236 ..... 1 n.1

Sup. Ct. R. 12.1 19
Sup. Ct. R. 12.2 19
Sup. Ct. R. 15.1(a) 4 n.9
Sup. Ct. R. 15.1(j)(ii) 9 n.17
Sup. Ct. R. 15.2 19
Sup. Ct. R. 28.1 1
Sup. Ct. R. 29.2 19
Sup. Ct. R. 33.7 19

Mich. Gen. Ct. R., 118.1 ..... 4 n.11

Mich. S. Ct. R. Concerning the State Bar of Mich., 1 ..... 2 n.3
Mich. S. Ct. R. Concerning the State Bar of Mich., 2 ..... 2 n.3
Mich. S. Ct. R. Concerning the State Bar of Mich., 3 ..... 2 n.3
Mich. S. Ct. R. Concerning the State Bar of Mich., 4 ..... 2 n.3
Mich. S. Ct. R. Concerning the State Bar of Mich., 9 .... 4 n.10

Miscellaneous:

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 5 n.11, 12 n.19

L. Tribe, *American Constitutional Law* (1978) 20

C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure: Jurisdiction* (1977) 12 n.19

No. 84-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

vs.

STATE BAR OF MICHIGAN, a Public Body Corporate,

*Appellee**

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Appellant is a lawyer licensed to practice in Michigan and is required by Rule of the Michigan Supreme Court to be a member of its integrated Bar. As an integrated bar, the State Bar of Michigan (hereinafter, sometimes, "the State Bar"), is a "public body corporate" created by sovereign act of the Michigan Legislature[1] and pursuant to the Supreme Court of Michi-

*Pursuant to Sup.Ct.R. 28.1, Appellee, State Bar of Michigan, advises that it is a Public Body Corporate of the State of Michigan, created by Act of the Michigan Legislature and pursuant to the inherent powers of the Supreme Court of Michigan. *See* note 1 *infra.* It has no parent, subsidiary or affiliate corporation.

[1]1935 Mich. Pub. Acts 58, *as amended,* 1947 Mich. Pub. Acts 34, *subsequently superceded,* 1962 Mich. Pub. Acts 236, *presently codified in,* Mich. Comp. Laws §§ 600.901 & .904 (1979). (App. 55b).

gan's inherent power[2] to control the legal profession and the administration of justice within the State. By Michigan Supreme Court Rules Concerning the State Bar of Michigan, a lawyer to be allowed to practice is required to be a member of and — in order to maintain membership — must pay annual dues to the State Bar.[3] Rule 1 in particular describes Appellee's origin and purpose. (App. 56b).

Following this Court's decision in *Abood* v *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), Appellant maintained, in the Supreme Court of Michigan, that he did not agree with, or support various activities of the State Bar. Therefore, according to his reading of *Abood* a pro-rata share of his compulsory mandated bar dues could not constitutionally be exacted to sustain such activities.[4] Relying upon his understanding of *Abood*, Mr. Falk characterized his First Amendment interest as one of non-association.

(Interestingly, however, he has frequently conceded (J.S. at 9, 20), that the concept of the unified or compulsory bar is itself not violative of the First Amendment. His First Amendment arguments are, therefore, significantly limited by this concession. *See Ellis* v *Brotherhood of Railway, Airline & Steamship Clerks*, 104 S.Ct. 1883, 1896 (1984) [sometimes hereafter, *Ellis* or *Ellis* v *Railway Clerks*]).

Rather, in Appellant's view, the State Bar only infringes upon the right to non-association if it acts in a fashion which is either not to his liking or not to his monetary advantage, or contrary to his conscience or subjective beliefs.

---

[2]*See* (J.S. App. 77-84 [411 Mich. 124-31]).

[3]*Mich. Sup. Ct. Rules Concerning the State Bar of Mich.*, 1, 2, 3, 4; Mich. Comp. Laws §§ 600.901 (last sentence) & 600.904 (1979). (App. 55b-59b). The Michigan statutes defer completely to the Supreme Court of Michigan to define the requirements for practicing law and to regulate the State Bar.

[4]Record, *Petition for Special Relief dd. Nov. 30, 1977* ¶1(g), at 3.

Seminal to these contentions is Appellant's claim that he is not a "practicing lawyer", albeit he submits that being licensed is a condition of his employment.[5] He further maintains he may not engage in private practice in his present position.[6] Many of the Bar's subsidized activities are assailed, therefore, from his personally utilitarian perspective as devoid of economic benefit to Appellant. (J.S. App. 18 [418 Mich. at 294]).

In all, Appellant initially complained of some eleven (11) Bar activities.[7] Three of these were mooted while the case was pending in state court, (J.S. App. [418 Mich. at 280]),[8] and at least two others were abandoned by exclusion from the Juris-

---

[5]Appellant is a Commissioner of the Michigan Court of Appeals. No Michigan statute, court rule or regulation either creates or describes the office or duties of such a Commissioner. The Record does include Appellant's own testimony that touches upon his employment, but it is far from certain whether his duties are clerical, ministerial, advisory or some combination thereof. Record, *Appendix of State Bar filed in Mich. Sup. Ct. dd. May 25, 1979* at 251b-254b. As the Record presently stands, the only thing that has been established is that Mr. Falk voluntarily elected to sit for the Michigan Bar examination and thereby became a duly licensed Michigan attorney in 1972. Record, *Appendix of State Bar filed in Mich. Sup. Ct. dd. May 25, 1979* at 251b & 257b.

[6]Mr. Falk never challenged the purported prohibition on private practice, although it effectuates a *direct* infringement upon an *affirmative* right of association (with clients and with other lawyers, groups or assocaitons). Presumably this does not entirely eradicate Mr. Falk's present claims, but it does demonstrate his utilitarian complaints are arbitrarily selective, based upon a false predicate and not so onerous as he would have them appear. Mr. Falk has simply and freely chosen not to involve himself in active practice and the concerns surrounding it.

[7]The Michigan Court set forth the original eleven (11) challenges on both occasions the matter came before it. (J.S. App. 3 [418 Mich. at 279]; 73 [411 Mich. at 120]).

[8]During the pendency of the matter in the Michigan Court, Appellee voluntarily implemented a procedure for otherwise eligible members to disassociate themselves from the Young Lawyers' Section. (Certain activities of the Section, however, remained the 'live' objects of Appellant's protest). Also, despite repeated misunderstanding of the nature of the use of the Bar's roster or mailing list for what Appellant alleged were "commercial" purposes, the issue has been completely resolved, and therefore, mooted.

dictional Statement.[9] Mr. Falk's remaining objections now readily fall into but a few principal categories: 1) activities designed to foster public awareness of, and access to legal services and activities that protect clients from unscrupulous Michigan attorneys who misappropriate their funds held in escrow; 2) funding of social activities; and 3) legislative contacts, efforts to influence legislation (or "lobbying")[10], and allegations concerning 'other political' activities.[11]

---

[9]Funding of Lawyers' Wives of Michigan (except to the extent that group is involved in public education about legal services) and support for the Children's Charter of Michigan are not asserted in the Jurisdictional Statement and must be presumed to have been abandoned. Sup.Ct.R. 15.1(a); *Quilloin v. Walcott*, 434 U.S. 246 (1978). Appellant's failure to here renew his unsuccessful complaints about the State Bar's monthly publication, *The Michigan Bar Journal* (a contention which was not listed by the Michigan Court — *see* (J.S. App. 3 [418 Mich. at 279]; 73 [411 Mich. at 120])) precludes review in this Court.

[10]The challenged conduct hardly constitutes "lobbying" in the full pejorative sense the term has come to connote. The Second Fact-finder readily found *see* (App. 14b-16b, 19b) that the vast majority of the State Bar's legislative contacts constituted technical assistance in drafting legislation — a desirable service performed not only without cost, *see Mich. Sup. Ct. R. Concerning State Bar of Mich.* 9 (App. 66b) but one for which there was no available alternative. (App. 14b-16b). Conversely, the small remainder of the State Bar's dealings with the Legislature which might be characterized as "lobbying" or attempts to influence legislation comprised but a fraction of the Bar's efforts in this arena. For example, in the 1979-80 session, some 4000-5000 bills were introduced. The Bar took a "pro" or "con" position on but 78 of those bills and only actively pursued or "lobbied" its position on 40 of that 78. All 78 proposed legislative Acts were directly involved in the administration and effectuation of the Michigan justice system. Record, *Testimony of Francis J. Coomes dd. Aug. 28, 1981* at 70-71.

[11]Appellant has claimed Appellee improperly funded a member's campaign for the presidency of the American Bar Association. This contention is not properly before the Court. The allegedly inappropriate expenditure occurred on September 17, 1979 — well before the time the Michigan Court rendered its first set of opinions on April 29, 1981. Nevertheless, Appellant never sought leave to amend his Petition for Special Relief (Mich. Gen. Ct. R., 118.1) to complain about such an expenditure prior to that time; indeed, he *never* sought leave to so amend at *any* time. *None* of the members of the Michigan Court addressed or even mentioned the claim in any of the final sets of opinions; they apparently did not believe such a claim was before them even under the "relaxed" practice employed in this extraordinary proceeding. Also, the majority held that *Falk I* was the "law of the case."

Appellant, on November 30, 1977, elected to commence an original proceeding in the Supreme Court of Michigan invoking that Court's extraordinary and exclusive power to superintend Appellee. (J.S. App. 39, 119 [411 Mich. at 86, 166]. The initiating pleading, "a Petition for Special Relief", only prayed the Petition be granted and, according to the Michigan Court was neither a complaint nor did it state a cause of action under local law and procedure. (J.S. App. 38-39 & n.3, 119 & n.1 [411 Mich. at 85-86 & n.3, 166 & n.1]).[12] Significantly Appellant did not assert his constitutional claims in a state cause of action, (J.S. App. 119 & n.1 [411 Mich. at 166 & n.1]; 23-24 [418 Mich. at 299-300]), nor did he bring an actionable cause in the United States District Court (or state court), pursuant to 42 U.S.C. § 1983 (1982) against officials of Appellee or members of the Michigan Court for deprivation of federally protected rights under color of state law.[13]

By this tactical election, Appellant unquestionably sought a purely state law based inquiry into, and regulation of the State

---

Therefore, only those issues presented in *Falk I* which were not definitively decided needed to be resolved. (J.S. App. 3-4, 24-26, 29 & n.4 [418 Mich. at 277-79, 300-302, 305 & n.4]). Of course, this Court has no jurisdiction to entertain questions not properly raised below, and, hence, were not considered or decided by the state court. *McKeesport Area Sch. Dist. v. Pennsylvania Dep't Educ.*, 446 U.S. 970, 976 (1980) (White, J., concurring); *Crowell v. Randell*, 10 Pet. 368, 396, 397-98 (1836). *See* R. Stern & E. Gressman, *Supreme Court Practice* §3.27, at 214 (5th ed. 1978).

[12]The only possible support for the conclusion that Appellant stated a cause of action was Justice Ryan's innocuous and patently erroneous allusion to the First Amendment giving rise to some generalized cause of action. (J.S. App. 66-67 [411 Mich. at 113-14]). Although this Court has held that an implied cause of action arises under 28 U.S.C. § 1331 (1982) for violations of the Fourth, Fifth and Eighth Amendments, *e.g., Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980), those cases contemplate suits in federal court against federal officials. Generalized constitutional implied causes of action have never been authorized by the Court, particularly in instances such as this where fully adequate causes of action to vindicate the particular claims exist, but simply were not employed. *See Carlson v. Green*, 446 U.S. at 18-23.

[13]*See* note 21 *infra*.

Bar, more than he sought an adjudication of his personal constitutional rights. Correlatively, the "action" was directed solely at the State Bar *qua* an entity of, and indivisible from the Michigan Court and not at its officials for unconstitutional actions. Indeed, Appellant's own testimony reveals that —

> "One of my motives in bringing this suit and relevant to this action, to the extent the Supreme Court [of Michigan] through its advisory power might, for policy reasons, determine to deunify the Bar to some extent, ..."[14]

Certain institutional or strategic benefits also were derived from proceeding in such a fashion. For example, Appellant's forum selection permitted a complete bypass of Michigan's intermediate appellate and trial courts. Moreover, the Michigan Court could expand the issues far beyond the scope of the litigant's interests; abandon rules of procedure circumscribing ordinary lawsuits; modify (or indeed deunify) Appellee for reasons wholly unrelated to the Appellant's claims; and most importantly, render advisory-type rulings on the constitutional implications of the Bar's activities, notwithstanding the fact that no actionable claim was before it. (J.S. App. 1 [418 Mich at 277]; 119-20 & n.1 [411 Mich. at 166-67 & n.1]). *See also* (J.S. App. 75 & n.4 [411 Mich at 122 & n.4]; 2-3, 23-24 [418 Mich. at 278-79, 299-300]). As Justice Levin aptly noted, this matter was in the nature of a rule-making proceeding but in no event was it a lawsuit. (J.S. App. 119-20 & n.1 [411 Mich. at 166-67 & n.1]; 23-24 [418 Mich. at 299-300]).[15] The analogue

[14]Record, *Appendix of State bar filed in Mich. Sup. Ct. dd. May 25, 1979* at 252b.

[15]Appellant attempts to gloss over a significant hurdle to justiciability by characterizing Justice Levin's comments as a "procedural point" rejected by other members of the Michigan Court. (J.S. at 2-3). In fact, the Justices who did comment upon how the case was presented, merely elected to consider the matter as a complaint for superintending control within their original jurisdiction to supervise Appellee citing, *inter alia*, Mich. Comp. Laws §§ 600.215, & .219 (1979). *See* (J.S. App. 38-40, 75 & n.4 [411 Mich. at 85-87, 122 & n.4]; 2-3 [418 Mich. at 278-79]). In Michigan, superintending control is a remedy that does not necessarily require the presence of an

Appellee found most helpful was that of a Royal Commission or Judicial Inquiry but, invariably, adversarial litigation in any real or conventional sense was never contemplated.

Appellee answered the Petition denying the constitutional contentions, and the Michigan Court appointed a First Fact-finder, the Hon. Maurice E. Schoenberger, to conduct a hearing. 402 Mich. 960 (1978). Two full days (June 5 & 6, 1978) were dedicated to the proffering of exhibits and the eliciting of testimony from three witnesses; a former President of Appellee, the Executive Director of Appellee and the Appellant. On September 29, 1978, the First Fact-finder submitted a Report to the Michigan Court. (App. 316-556). This was followed by extensive briefing and oral argument was heard on June 5, 1979. 406 Mich. 1117 (1979).

A per curiam Order, 411 Mich. 63, 305 N.W.2d 201 (1981) and seriatim opinions were issued by the Michigan Court on April 29, 1981. (J.S. App. 37, 73, 118 [411 Mich. at 84, 120, 165]). A majority could not be mustered on either reasoning or remedy. The principal disagreement involved the standard or analytic construct to be used with respect to the First Amendment contentions, or put another way, there existed an interminable dispute as to how to read and apply *Abood*.[16] The Justices inability to obtain a clear majority on matters of substance

---

actual adversarial controversy or actionable claim. *See, e.g., In re Hague*, 412 Mich. 532, 545-47, 315 N.W.2d 524, 529-30 (1982); *In re Probert*, 411 Mich. 210, 229-30, 308 N.W.2d 773, 778-79 (1981); *In re Huff*, 352 Mich. 402, 417-18, 91 N.W.2d 613, 620 (1958). Moreover, none of the other opinions directly rejected Justice Levin's comments. *See* (J.S. App. 38-40, 75 & n.4 [411 Mich. at 85-87, 122 & n.4]; 2-3 [418 Mich. at 278-79]). Justices Levin and Kavanagh merely elected to give their advisory thoughts on some, but not all of the constitutional issues implicated, while their colleagues felt free to opine in the abstract on any subject or issue deemed relevant to the Inquiry.

[16]The disparity of readings of *Abood* would appear to have been definitively resolved by this Court in favor of the position advocated by Appellee and adopted by Justice Williams and Chief Justice Coleman. *See Ellis v. Railway Clerks*, 104 S.Ct. at 1892, 1896-97.

prompted unanimous agreement to remand for further hearings and record development. (J.S. App. 36 [411 Mich. at 83]). The Hon. James H. Lincoln was appointed as the Second Fact-finder to conduct the additional hearings.

On remand, Judge Lincoln conducted an exhaustive and vigorous Judicial Inquiry into the functions and operations of Appellee. He required, *inter alia*, the Bar to produce the Chair or other representative of each of its fifty-two (52) committees, as well as the President or Executive Director of the voluntary bar associations of Iowa, Massachusetts, Ohio and the voluntary/involuntary District of Columbia Bar. In all, eighty-three (83) witnesses, over a period of twelve (12) full trial days, were presented, underwent cross-examination and, most importantly, were subjected to vigorous inquiry from the Fact-finder. Several thousands of pages of documents were accepted as exhibits. This experience was unique in the life of the organized bar, voluntary or involuntary, anywhere in this Country. The life of the State Bar was thoroughly explored, examined and investigated in a way never before experienced by any profession in the United States. Interestingly, Appellant failed to appear at a number of the hearing sessions, trusting counsel for Appellee and the Fact-finder to fully protect his interests.

On March 27, 1982, the Hearing Officer filed his Report including Findings of Fact, Conclusions and Recommendations. (App. 3b-31b). Those findings sustained, as matters of fact, the vast majority of Appellee's challenged activities under even the most exacting constitutional standards. *See* (App. 8b-26b). The Hearing Officer refrained from deciding the constitutional questions because such were not within his charge.

Judge Lincoln, however, did suggest that various minor modifications be adopted and that the Michigan Court should promulgate certain procedural requirements pursuant to its supervisory powers — such recommendations being based upon his unique knowledge of the Record. With the exception

of certain proposals going to the mechanics of notice and voting, his suggestions were voluntarily implemented by the Bar prior to the second round of oral argument.

In making his Findings, Judge Lincoln specifically relied upon the entire Record and refused to summarize the testimony, concluding that the Michigan Court would necessarily have to rely directly upon the Record in any event. (App. 3b-4b). Nevertheless, Appellant filed his Brief on Remand accompanied by a self-serving summary of the testimony of the witnesses. Appellee filed its Brief on Remand and adopted, *in toto*, the facts as found by the Hearing Officer.[17] Appellant filed a reply Brief, and a second round of oral argument was entertained by the Michigan Court on March 3, 1983.

On December 29, 1983, a second set of seriatim opinions and a per curiam Order dismissing the Petition for Special Relief were issued by the Michigan Court. 418 Mich. 270, 342 N.W.2d 504 (1983). After concluding that *Falk I* had dispositively approved certain Bar activities and hence could not be reexamined, Justice Boyle's lead opinion reasonably articulated yet another standard for reviewing the constitutional problems and found that none of the challenged activities were imper-

[17]Appellant continues to insist upon the importance of his own self-serving witness summary by including it in his Appendix (J.S. App. 5a-45a) and by making reference to it "as crucial to an understanding of the issues herein presented." (J.S. at 9). This is done, however, at the expense of excluding from those appended materials, the Reports and Findings of Fact of both Fact-finders — items Appellant must present to this Court. Sup.Ct.R. 15.1 (j)(ii). The contention that Appellee somehow accepted this witness summary under local procedure by not proposing a "counter statement of facts" is entirely misguided. Appellee explicitly adopted the findings of the Second Fact-finder — the judicial functionary exclusively entrusted with fact determination and who, himself, refused to rely upon litigant summaries or to commend them to the Michigan Court. Indeed, a majority of that Court adopted those findings and saw nothing whatsoever improper in Appellee's doing the same in original proceedings. Appellant's reliance upon the minority's position on this point articulated in a footnote is therefore irrefutably defeated and of no significance. The Record itself, and not Appellant's characterization or summary of it, is solely before this Court.

missible under the First Amendment.[18] Chief Justice Williams concurred. Justices Kavanaugh and Levin, who had earlier sought the expanded record development, adhered to their belief that the matter was not a lawsuit but more in the nature of rule making proceedings; that the matter had only been entertained by the Michigan Court in its capacity to regulate

---

[18]Justice Boyle, through a careful exegesis of decisions of this Court addressing negative First Amendment, or non-association claims, held it imperative to balance the severity of injury to the individual interest, if existent, against the magnitude of the governmental interest to be served by the infringing requirement or regulation. (J.S. App. 6-11, 11-16 [418 Mich. at 282-87, 287-92]), *citing, Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). For analytic purposes, Justice Boyle categorized the contested activities into the "Political" and "Non-Political." (J.S. App. 16-17 [418 Mich. at 292-93]).

With respect to "Non-Political" activities, she opined that no First Amendment interests were implicated and, even if it could be assumed that such "activities could be characterized as encompassing some ideological content, any asserted connection with the Appellant would be far too attenuated to constitute a burden on the freedom of conscience that underlies negative First Amendment protection." (J.S. App. 18 [418 Mich. at 294]). Additionally, the "Non-Political" activities were also perceived as fairly within the normal functionings of a constitutionality valid integrated bar. (J.S. App. 19 [418 Mich. at 295]).

In contrast, "Political" activities were said to cause a "more complete application of the constitutional test." *Id.* Although "some cognizable First Amendment injury" ensued, the challenged activities were thought to be easily sustained. The State's compelling interest in receiving expert participation in the legislative process by the Bar clearly outweighed any minor infringement. Also, she noted Appellant is not forced to express personal agreement with the "political" positions of the Bar and indeed is completely free to take contrary public positions. Therefore, his connection to the compelled expression is remote, or at best is clearly not sufficiently intimate to be impermissible. (J.S. App. 20-21 [418 Mich. at 296-97]). Justice Boyle further stated (as did the Fact-finder) that the Legislature had a keen interest in obtaining advice from the Bar, which is "made up of lawyers whose business necessarily entails knowing, understanding, utilizing and interpreting the law." (J.S. App. 21 [418 Mich. at 297]). In this respect, the State Bar was perceived as qualitatively different from the labor union involved in *Abood*. The Bar brings (at no cost) "its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature" (J.S. App. 22 [418 Mich. at 298]) — a unique service which has no counterpart. (App. 23b-26b). Accordingly, the Boyle Opinion justified Appellee's "Political" Activities. (J.S. App. 22-21 [418 Mich. at 298-99]).

the conduct of the Bar; and, accordingly, it "should await a proceeding wherein it is necessary for decision to reach the constitutional questions." (J.S. App. 24 [418 Mich. at 300]). Justice Ryan reiterated the position adopted in his earlier opinion (J.S. App. 24-29 [418 Mich. at 300-305]) which he attempted to apply to the challenged activities believed either not to have been addressed in *Falk I* or not mooted in the interim. Some activities were said to be justified while others were said to be unsustainable. (J.S. App. 31-34 [418 Mich. at 307-10]). Justices Brickley and Cavanagh concurred in that minority opinion. Appellant sought rehearing in a timely fashion under local procedure, which was denied on March 6, 1984. (J.S. App. 1a).

The last paragraph of the per curiam Order dismissing the Petition readily demonstrates that the proceedings were not adversarial nor did they constitute litigation, in any controversial sense.

> "This proceeding has convinced us all, however, that certain practices of the State Bar may warrant closer scrutiny pursuant to our duty to superintend its activities. We will in the near future, therefore, by separate administrative order, appoint a committee to review those practices and activities and make recommendations to the Court."
> (J.S. App. 1 [418 Mich. at 277]).

On January 31, 1984, an Order was entered pursuant to the Michigan Court's power to superintend Appellee which created such a Committee. (App. 1b-2b). The Committee made its report to the Court on September 17, 1984, and as of this date, neither has the report been made public nor has the Michigan Court taken any action on it.

On May 24, 1984, Appellant filed a Notice of Appeal to this Court. The Clerk of this Court rejected the Jurisdictional Statement submitted on May 30, 1984 because it did not conform with the form mandated by Rule. Appellant did not submit acceptable copies until on or about September 1, 1984 (the date they were received by Appellee) — one hundred and

ninety (190) days from the Michigan Court's March 6th denial of rehearing and ninety-four (94) days from the May 30th defective submission.

THE COURT'S JURISDICTION

A. This Matter Is Not Within The Court's Appellate Jurisdiction Conferred By 28 U.S.C. § 1257(2).

The Record, as reflected in the papers filed in this and the Michigan Court, does not reveal that Appellant explicitly challenged the validity, as applied, of the Michigan Statutes or the Rules Concerning the State Bar cited by him in his Jurisdictional Statement. Rather, it only shows that he attacked particular activities of the Bar on federal constitutional grounds. There is therefore no jurisdiction under 28 U.S.C. § 1257(2) (1982).[19] The matter is reviewable, if at all, only by way of the Court's certiorari jurisdiction under 28 U.S.C. § 1257(3) (1982). Although the Court invariably has discretionary power to treat the papers as a petition for certiorari, 28 U.S.C. § 2103 (1982), Appellant never sought such alternative relief. *See Bellotti* v *Connolly,* 103 S.Ct. 1510 (1983) (appeal dismissed, certiorari denied after treating papers as a petition).

B. Justiciability

Since the earliest dasy of the Republic, this Court has been loathe to render advisory opinions. *Hayburn's Case,* 2 Dall. 409

[19] *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 562-63 n.4 (1980); *Kulko v. Superior Court,* 436 U.S. 84, 90 & n.4 (1978); *Hanson v. Denckla,* 357 U.S. 235, 244 & n.4 (1958); *Charleston Fed. Sav & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-87 (1945). *See also Calder v. Jones,* 104 S.Ct. 1482, 1486 & n.7 (1984); *Silkwood v. Kerr-McGee Corp.,* 104 S.Ct. 615, 620-21 & n.9 (1984) ("statutes authorizing appeals are to be strictly construed."); R. Stern & E. Gressman, *Supreme Court Practice* 163-164 (5th ed. 1978); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure: Jurisdiction* § 4012, at 618 & nn.51 & 53 (1977).

Appellant's attempt to reply on *Lathrop v. Donohue,* 367 U.S. 820 (1961) (J.S. at 2), is thoroughly misplaced. At every juncture below, Lathrop (unlike Falk) explicitly challenged the validity of the Wisconsin Court Directive and Rules as repugnant to the Constitution. Record, *Lathrop v. Donohue,* at 6, (Orig. Complaint ¶20, at 6, Wisc. Cir. Ct., Dade County, dd. June 9, 1959).

(1792). This reluctance eminates from Art. III, §2's actual "case or controversy" requirement and has repeatedly been reiterated.[20] Even to review a duly entered state court judgment involving federal issues, the Court must determine if a "case or controversy" exists. As Mr. Justice Jackson once observed, "[w]e do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." *Doremus* v *Board of Educ.*, 342 U.S. 429, 434 (1952) (appeal dismissed in taxpayer's First Amendment challenge to state expenditure for school Bible readings). *See also Goldwater* v *Carter*, 444 U.S. 996, 1005 & n.2 (1979) (Rehnquist, J., concurring); *Bateman* v *Arizona*, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., in chambers).

As discussed, the Michigan Court did not entertain this matter as a ordinary lawsuit nor did Appellant present an actionable claim as a matter of primary remedial law. Indeed, the Fact-finder and the Michigan Court expanded the issues to be explored, following the trail of their curiosity and interest where-ever that might lead — hardly the narrow, restrained or reluctant variety of judicial review that must attend adjudication of constitutional claims in adversarial contexts. *Marbury* v *Madison*, 1 Cranch 137 (1803). *See also Allen* v *Wright*, 104 S.Ct. 3315, 3325 (1984); *Chicago & Grand Trunk R. R.* v *Wellman*, 143 U.S. 339, 345 (1892).

---

[20]*E.g., Allen v. Wright*, 104 S.Ct. 3315, 3324 (1984); *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982); *Valley Forge College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472-73 (1982); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Flast v. Cohen*, 392 U.S. 83 (1968); *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947); *Muskrat v. United States*, 219 U.S. 346 (1911).

Rather, the proceedings were unquestionably directed at regulation of the State Bar as an indivisible part of the Michigan Court. Appellant invoked that Court's exclusive and extraordinary authority to supervise the Bar by instituting his "suit" in that forum and in the hope it would be "deunified." Correlatively, thereby, he also specifically elected *not* to proceed on viable causes of action to adjudicate his personal constitutional claims — claims that had to be prosecuted in the other forums devoid of such extraordinary authority.[21] Although discussed by some members of the Michigan Court, Falk's personal claims were only considered in the sense they catalytically prompted broad inquiry into the functionings of the Appellee — the primary, if not sole purpose of the proceed-

[21]Appellant could have proceeded in the Michigan Court of Appeals or Circuit Court with an ordinary lawsuit or action for mandamus against a state official. (J.S. App. 119 & n.1 [411 Mich. at 166-67 & n.1]). Suit against the State Bar *qua* the State Bar, however, would have been precluded, as those Courts are devoid of supervisory authority. Similarly, a United States District Court suit to enjoin First Amendment deprivations under 42 U.S.C. § 1983 (1982), could not have proceeded against the State Bar *qua* State Bar because it is not a "person" within the meaning of that statute, *Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966); *Louis v. Supreme Court of Nev.*, 490 F.Supp. 1174, 1180 (D. Nev. 1980), and because it is not amenable to suit in federal court by virtue of the Eleventh Amendment. *O'Connor v. Nevada*, 507 F.Supp. 546, 550 (D. Nev. 1981). Although *Ex Parte Young*, 209 U.S. 123 (1980), would permit suit against state *officials* for such deprivations, a federal court would not, of course, have supervisory or regulatory powers over the Bar. In fact, the Defendants to such an action would have to be the very persons who exercise regulatory power over the Bar — the Justices of the Supreme Court of Michigan. *Cf. Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). A § 1983 claim against the Bar, as opposed to the Justices, would not be justiciable since it is under their exclusive control. The Bar may only make recommendations and, therefore, "no effective order [could] be entered against the State Bar to afford the Plaintiff the relief [he] seeks." *Louis v. Supreme Court of Nev.*, 490 F.Supp. at 1180. *See* note 25 *infra* & accompanying text.

Mr. Falk eschewed all of the limitations placed on ordinary litigants by invoking the supervisory powers of the Michigan Court. Inherent in that invocation, however, was the failure to properly preserve his individual constitutional claims. The fact that federal questions were presented in that context, and further that they initiated or catalytically induced the Judicial Inquiry, only shows that they were presented, not that the underlying suit is a "case or controversy."

ings. In this respect, the matter lacks important indicia in the "blend of constitutional requirements and prudential considerations" which make up the notion of justiciability under Art. III. *Valley Force College* v *Americans United for Separation of Church & State,* 454 U.S. 464, 471 (1982); *Warth* v *Seldin,* 422 U.S. 490, 498 (1975).

First, the free-roaming inquiry conducted by the Fact-finder took on many of the characteristics of a "publicly funded forum for the ventilation of public grievances or the refinement of jurisprudential understanding"; or in a word (and at its best) it was a "a judicial version of [a] college debating forum" clearly foreclosed by the "cases and controversies" language of Art. III. *Valley Forge College* v *Americans United,* 454 U.S. at 473. The Michigan Court's expansionist consideration of the constitutional implications to the Bar's activities was not only appropriate, but commendable in the context of examining the Bar as its symbiotic partner in the State's justice system. But precisely what made the proceedings so commendable in that context, make them ill-suited for this Court to resolve grave constitutional questions pursuant to an exercise of Art. III power. The Michigan Court ambitiously took on the "abstract questions of wide public significance" which amounted to "generalized grievances"; questions from which an Art. III Court must unquestionably abjure. *Id.* at 475. Unlike the Michigan Court, this Court is not empowered to consider "prevasively shared grievances" in a representative, political or even in a non-adjudicatory, rulemaking capacity, *id.*; nor does it "sit to decide hypothetical issues or to give advisory opinions . . .". *Princeton University* v *Schmid,* 455 U.S. 100, 102 (1982).

Second, and as an overlapping consideration, "'federal courts may exercise power only in the last resort, and as a necessity,' *Chicago & Grand Trunk R.R.* v *Wellman,* 143 U.S. 339, 345 (1892), and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally

thought to be capable of resolution through the judicial powers, *Flast* v *Cohen*, 392 U.S. 83, 97 (1968)." *Allen* v *Wright*, 104 S.Ct. at 3325. The Michigan Court's Herculean attempt to evaluate the Bar's life and actions spawned additional questions and prompted more, yet unresolved inquiry. The matter is thus unsuited to "last resort" and necessity oriented adjudication.

Third, the Fact-finder's and Appellee's Counsel's presentation of Mr. Falk's views or interests in his absence, as well as repeated concessions by the Bar of the extraordinary power (even to deunify) of the Michigan Court in these regulatory proceedings, aptly evidences that counsel neither adopted an adversarial posture nor an advocate's attitude —an approach that would have been patently out of order had an actual case or controversy been asserted against a client for alleged constitutional deprivations. Similarly, the Fact-finder would have proceeded far differently in the fact of a sufficiently concrete controversy. For example, neither rules of evidence nor procedure governing lawsuits were observed, for they were not in the least helpful *See* (App. 7b-35b).

As "[t]he purpose of the case-or-controversy requirement is to 'limit the business of federal courts to questions presented *in an adversary context* and in a form historically viewed as capable of resolution through the judicial process,'" *GTE Sylvania Inc* v *Consumers Union of the United States, Inc.*, 445 U.S. 375, 382 (1980) (emphasis supplied), *quoting, Flast* v *Cohen*, 392 U.S. at 95, the deficiencies here are self evident. For all of its intrinsic value to both Bench and Bar, this case lacks "[t]he clash of adverse parties [that] "'sharpens the presentations of issues upon which [an Art. III] court so largely depends for illumination of difficult . . . questions.'" *GTE Syulvania Inc.* v *Consumers Union*, 445 U.S. at 382-383, *quoting, O'Shea* v *Littleton*, 414 U.S. 488, 494 (1974) and *Baker* v *Carr*, 369 U.S. 186, 204 (1962).

Other factors indicate there exist serious, if not "insuperable

obstacles" to justiciability. *See Socialist Labor Party* v *Gilligan*, 406 U.S. 583, 588 (1972). For example, issues interjected by the Michigan Court or Fact-finder are undoubtedly not justiciable, because, as to them, the parties are clearly not in dispute. *Williams* v *Zbavaz*, 448 U.S. 358, 367 (1980).[22]

Also, albeit Appellee concedes that deciding whether this case is justiciable is a matter of federal law solely for the Court, *Princeton University* v *Schmid*, 455 U.S. 100, 102 n.1 (1982), such in no way diminishes the significance, to making that determination, of the Michigan Court's views on the non-adversarial nature of the proceedings and the character of Falk's efforts under local remedial law. Wisdom would dictate circumspection since in a very real sense, the supervisory proceedings continue on to this very day to consider many issues discussed in *Falk*.[23]

Moreover, and in view of this, a healthy federalism would suggest the Court refrain from rendering decision. As the

[22]The Michigan Court properly addressed several questions not raised by the parties in the supervisory proceedings. Most significant being the question Mr. Falk repeatedly states he does not ask (J.S. 9, 20): whether or not compelled membership in the State Bar violates the First Amendment. Of course, this is the lynch pin upon which each inquiry regarding particularly expenditures must turn. *See Ellis v. Railway Clerks*, 104 S.Ct. at 1896. All of the Justices of the Michigan Court, some impliedly, others explicitly, addressed this question considered by a plurality, but avoided by a majority of this Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961). The limitations imposed by Art. III take this critical and antecedent question beyond the pale of this Court's powers to decide. Further, even if this Court were to conclude that some of those interjected issues were somehow, technically justiciable because Mr. Falk belatedly (and benignly) acquiesced in them, review nevertheless would be foreclosed; they were not properly raised below. *See, e.g.*, note 12 *supra* where an alleged improper expenditure was not properly raised by Appellant.

[23]The Michigan Court, by separate order explicitly citing *Falk*, appointed a Committee to further review the activities of the State Bar. (App. 1b-2b). The Committee made its report on September 17, 1984, and, as of this date, the report has not been made public nor has the Michigan Court acted on it. While it cannot be seriously contended that this matter is not final under 28 U.S.C. § 1257 (1982), the pendency of the Committee proceedings does effectively illuminate the supervisory, non-justiciable characteristics of the subject proceedings — *i.e.* that *Falk* represented but a small part of the larger Inquiry.

Michigan Court is still deliberating and conceivably could exercise its purely state law prerogative in a variety of ways, its conclusions "might avoid in whole or in part the necessity for federal constitutional adjudication; or at least might materially alter the nature of the problem." *Harrison* v *NAACP*, 360 U.S. 167, 177 (1959).[24]

There stands the irrebutable fact that the Michigan Court is the paramount constitutional administrator over Michigan's justice system and, in that capacity, has sanctioned the challenged activities of the State Bar. The State Bar is, itself, then powerless to grant the relief Appellant seeks since "the prospect of effective relief against [it as] a defendant depends on the actions of a third party." *Duke Power Co.* v *Carolina Envtl. Study Group*, 438 U.S. 59, 101 (1979), *quoting, Warth* v *Seldin*, 422 U.S. at 505. Hence "no justiciable controversy exists against this defendant." *Id.* Simply put, assuming Appellant otherwise has concrete personal claims, they are presently asserted against the wrong party.[25] Only the Michigan Court can afford Appellant relief.

Finally, and at a minimum, the Michigan Court's ultimate disposition of the matter — a simple dismissal of the "Petition for Special Relief" — rests upon an adequate non-federal basis,

---

[24]Abstention is particularly appropriate when a state court has a matter pending before it that will likely resolve state law questions underlying federal claims. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975). Applying the abstention doctrine, the First Circuit recently vacated a District Court Judgment involving a First Amendment challenge to activities of Puerto Rico's integrated Bar or "Colegio de Abogardos", due to the pendency of related proceedings in the Supreme Court of Puerto Rico. *Romany v. Colegio de Abogados*, No. 83-1586, slip. op 19-28 (1st. Cir. Aug. 23, 1984), *vacating, Schneider v. Colegio de Abogados*, 565 F.Supp. 963 (D.P.R. 1983).

[25]*Louis v. Supreme Court of Nev.*, 490 F.Supp. at 1180. As the Bar is a part of the Court subject to its supervision, Appellee invited such supervision below. Having then obtained such, the Bar cannot now deunify itself or, more aptly, make other major modifications; only the Michigan Court could provide such relief. After all, that relief was only theoretically possible in the Michigan Court because it is Appellee's superintendent.

given the important deficiencies found to exist under Michigan law and practice.

C. This Matter Has Not Been Presented In Timely Fashion

A Jurisdictional Statement must be filed within ninety (90) days of judgment or denial of rehearing, Sup.Ct.R. 12.1 — the only exception being that a Justice of this Court may, for good cause shown, extend the time for a period not to exceed sixty (60) days provided application is made within ten (10) days of the specified final filing date. Sup.Ct.R. 12.2, 29.2. Such applications are disfavored. Sup.Ct.R. 12.2. The Jurisdictional Statement must also conform with the form mandated by Rule, Sup.Ct.R. 15.2, otherwise it will be returned by the Clerk. Sup.Ct.R. 33.7. That is precisely what occurred in this case. Although this Court will not ordinarily deem such a defective filing untimely, the 1980 Revision of the Court's Rules now puts the onus on the Appellant to *promptly* remedy the problem. Sup.Ct.R. 33.7. Appellee submits that Appellant's ninety-four (94) day delay in substituting new and proper copies was *not prompt*, (the two (2) submissions are identical in content), and accordingly, the case should be dismissed. Promptness within the meaning of Sup.Ct.R. 33.7 should not be interpreted to provide Appellant a *de facto* extension of time beyond sixty (60) days — relief a Justice of this Court is not even empowered to grant upon "good cause" shown. Sup.Ct.R. 12.2; 28 U.S.C. §2101(c) (1982). The Rules of this Court were designed to facilitate expeditious treatment of an inordinate volume of cases and the most pressing issues in our society. Appellant's tardy efforts undermine that significant institutional purpose. *See Pittsburgh Towing Co.* v *Mississippi Valley Barge Line Co.*, 385 U.S. 32, 32-33 (1966); *Landry* v *Boyle*, 393 U.S. 220 (1968).

THE FEDERAL QUESTION IS NOT SUBSTANTIAL

Over twenty years ago, Mr. Justice Harlan observed that it "borders on the chimerical" to argue that the use of Bar dues

to support "causes" to which an individual member does not subscribe is violative of the First Amendment. *Lathrop* v *Donohue*, 367 U.S. at 852 (Harlan J., concurring). That insight all but foreclosed the subject until *Abood* precipitated renewed interest in determining permissible constitutional limits of integrated Bar activity. Despite the conceptual problems with analogizing a compulsory Bar Association to a labor union, a few lower courts and commentators, misperceiving the import of *Abood*, quickly concluded that every Bar activity had to be justified under the most exacting (and in their view only) First Amendment standard. Namely, every activity had to fulfill a compelling governmental purpose which could not be implemented by any less drastic means. *E.g.*., (J.S. App. 59-65 [411 Mich. at 106-12]).

On a theoretical level, it cannot seriously be imagined that the benign, indirect and content neutral (if at all existent) infringements which might ensue from expenditure of compelled dues could ever be compared, for analytic purposes, to the explicitly political, direct and content based inhibitions upon association which generated such a standard. *E.g., NAACP* v *Alabama ex. rel. Patterson*, 357 U.S. 449, 462-63 (1958). *See* L. Tribe, *American Constitutional Law* § 12-23, at 703 (1978). Nevertheless, this Court did not until recently find it necessary to elaborate upon the topic, except to prohibit, in the agency shop context, expenditures not "germane" to the collective bargaining process. *See Ellis* v *Railway Clerks*, 104 S.Ct. at 1891-92. Accordingly, and prior to *Ellis*, the wake of *Abood* left definite uncertainty regarding such matters.

However, the necessity for resolving such ambiguity was put to rest by *Ellis*. The federal question presented is not unsubstantial. In *Ellis*, this Court determined that when an employee objects to an expenditure under the Railway Labor Act, "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative . . ". *Ellis* v

Railway Clerks, 104 S.Ct. at 1892. Not only may dissenting employees be assessed the direct costs of collective bargaining "but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative . . .". *Id.*

Ellis therefore reiterates in explicit terms the proposition put somewhat cryptically in *Abood* and *Brotherhood of Railway & Steamship Clerks* v *Allen*, 373 U.S. 113, 121-22 (1963); *i.e.*, once the compelled association is justified by an overarching governmental interest, particular expenditures need only be "germane" to that legitimate concern. "Relate to the work," "necessarily or reasonably incurred," "sufficiently related", "normally or reasonably employed," or "within acceptable range" in contradistinction to "attenuated connection," "most distant," "attenuated benefit," "extended [too] far," or "[a] far cry [from]", all describe the connection between a compelling governmental interest and, respectively, permissible and impermissible expenditures. *Ellis* v *Railway Clerks*, 104 S.Ct. at 1892-97. When synthesized, these phrases from *Ellis* readily reveal that whether or not a sufficiently reasonable relationship exists between a particular expenditure and the general governmental interest is determinative of its constitutional propriety. Although the Michigan Court did not have the benefit of *Ellis*, all of its opinions indicate that the challenged activities would have easily been justified under such a standard.

Ellis also suggests another reason why the federal question presented is not substantial. While the First Amendment "does limit the uses to which the union can put funds obtained from dissenting members," *id.* at 1896, the Court went on to state that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Id.* Therefore, the critical inquiry is focused upon whether the antecedent compelled assocation — *i.e.* here, forced membership in the State Bar — can be justified. If a compelling governmental interest supports that association, then expen-

ditures of dues in furtherance of its are allowable unless, of course, such "expenses involve *additional* interference with First Amendment interests of objecting employees [or members]" which are not "adequately supported by a governmental interest." *Id.* (emphasis supplied).

The constitutionality of compulsory Bar membership was established in *Lathrop.* However, even if the viability of that precedent were uncertain, Mr. Falk concedes he may constitutionally be compelled to be a member of the Bar. In view of this, little else need be said. Challenges directed at the Bar's social functions and at activities designed to foster public awareness of, access to legal services and to protect the public from misappropriation of client funds are unquestionably justified since, "the fact that the employee [or member] is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union [or Bar Association]." *Ellis* v *Railway Clerks,* 104 S.Ct. at 1896. As Justice Boyle found below, (J.S. App. 17-19 [418 Mich. at 293-95]), no protected First Amendment interest is implicated by such activities. Appellant "may feel that [his] money is not being well-spent, but that does not mean [he has] a First Amendment complaint." *Ellis* v *Railway Clerks,* 104 S.Ct. at 1896.

Regarding Bar involvement in the legislative process, the potential for First Amendment infringements may be greater.[26] (Technical assistance in drafting legislation does not, it is respectfully suggested, implicate constitutional interests.) Nevertheless, the Record categorically shows that only a tiny fraction of the Bar's legislative contacts involved attempts to influence legislation and, even then, were carefully monitored

[26]The Third Circuit, in the first decision to address the constitutionality of "lobbying," found *Ellis* reaffirmed the "germane" standard, sustained a New Jersey statute permitting a public employees' union to "lobby" and further noted that, "lobbying has no different constitutional implications than any other form of union activity that may be financed with representative fees." *Robinson v. New Jersey,* No. 82-5698, slip. op. 26 (3d. Cir. Aug. 6, 1984).

efforts concerning matters upon which the input of lawyers, due to their peculiar knowledge and skills, was vital. Moreover, it is undisputed that the Appellant is free to express, at any time and in any way, contrary ideas and views to those adopted by the Bar. Further, the likelihood of others associating the Bar's publicly adopted positions with Appellant is, at best, remote. (J.S. App. 19-23 [418 Mich. at 295-289]). Undoubtedly, any alleged infringement is benign and indirect.

Finally, the significance of lawyers' unique, broad-based and irreplaceable service to the Legislature concerning matters touching upon the law, cannot be overstated in the calculus to determine permissible activity. Although this Court properly dispelled the notion that lawyers are mystic figures magically immune from the Constitution in cases like *Bates* v *State Bar of Ariz.*, 433 U.S. 350 (1977) and *Goldfarb* v *Virginia State Bar*, 421 U.S. 773 (1975), it has nevertheless recognized — often in just such cases — that they also play a unique role in government and society. "The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and historically have been 'officers of the court.'" *Id.* at 792. The point was made again this term when the Court noted that, "[f]ew other professions are as close to "the core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice." *Hoover* v *Ronwin*, 104 S.Ct. 1988, 1996 n.18 (1984). As Justice Boyle noted below,

> "The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing and interpreting the law. In this sense, the State Bar is quite diferent from the labor union involved in *Abood*. It is true that the government might have a keen interest in legislative participation of a labor union in specialized areas of law, touching directly on the field of employment of union members or in the area of collective bargaining. But lawyers are involved with the

> law in almost all its forms. Therefore, their input is of broader interest to the Legislature.
>
> In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature." (J.S. App. 21-23 [418 Mich. at 297-98])

Such challenged expenditures are therefore "well within the acceptable range." *Ellis* v *Railway Clerks*, 104 S.Ct. at 1896.

PRAYER FOR DISMISSAL OR AFFIRMATION

In view of the foregoing, Appellee prays the Court dismiss the appeal or affirm the Judgment below. If, however, the Court believes a substantial federal question is presented, is justiciable and otherwise properly before it, Appellee respectfully suggests the matter is unique in the life of Bench and Bar in this Republic. The uncertainty of *Abood's* application to Bar Associations, although apparently resolved by *Ellis*, has left integrated Bars sincerely desirous of guidance from the Court as to the permissible scope of their activities. As lawyers, our first obligation by oath is to uphold the Constitution.

The Record in this matter is singularly unique and unlikely to ever be paralleled. Therefore, on a keenly practical note, Appellee submits that this case, as opposed to other cases, offers the Court a proper vehicle to address these matters of great significance to the administration of justice in this Country.

Respectfully Submitted,

BUSHNELL, GAGE, DOCTOROFF
& REIZEN

BY: GEORGE E. BUSHNELL, JR.
(Counsel of Record)

BY: JOHN K. PARKER
3000 Town Center, Suite 1500
Southfield, Michigan 48075
(444-4848)

Dated: September 28, 1984

APPENDIX

I

INDEX TO APPENDIX TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Page

1. Opinions, Orders, Findings or Conclusions Rendered by Courts if Reference thereto is Necessary to Ascertain the Grounds of the Judgment or Decree (R.15.1 (j) (ii)).
   a. Supreme Court of the State of Michigan
      Order of the Supreme Court of the State of Michigan creating and appointing members to a committee to examine certain activities of the State Bar of Michigan in *In the Matter of the Supervision of the State Bar of Michigan* dated January 31, 1984 ..... 1b-2b
   b. Hearing Officers Designated and Appointed by the Supreme Court of Michigan
      i. The Report — including cover letter, Introduction, Discussion, Fact-Finding, Conclusions and Recommendations — of the Hon. James H. Lincoln, the Second Hearing Officer Designated by the Supreme Court of Michigan to take testimony on Remand, dated March 27, 1982 ..... 3b-31b
      ii. The Report (with exhibits) of the Hon. Maurice E. Schoenberger the First Hearing officer Designated by the Supreme Court of Michigan to take Testimony on the First Round of Briefing and Argument, dated September 29, 1978 ..... 31b-55b

2. Other Appended Materials (R.15.1 (j) (v))
   a. Relevant Statutes, Rules & By-laws
      i. Michigan Statutes
         a. Mich. Comp. Laws §600.901 (1979) 55b
         b. Mich. Comp. Laws §600.904 (1979) 55b
         c. Mich. Comp. Laws §600.907 (1979) 55b-56b
      ii. Supreme Court Rules Concerning the State Bar of Michigan
         a. Rule 1, State Bar of Michigan 56b

Page

b. Rule 2, Membership 56b-57b
c. Rule 3, Membership Classes 57b-58b
d. Rule 4, Membership Dues 58b-59b
e. Rule 5, Board of Commissioners 59b-63b
f. Rule 6, Representative Assembly 63b-66b
g. Rule 9, Disbursements 66b

iii. By-laws of the State Bar of Michigan
Article IX, Public Statements 67b

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 31st day of January in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable G. MENNEN WILLIAMS, Chief Justice, THOMAS GILES KAVANAGH, CHARLES L. LEVIN, JAMES L. RYAN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, Associate Justices.

IN THE MATTER OF THE SUPERVISION OF THE STATE BAR OF MICHIGAN

On order of the Court, this Court having decided *Falk* v *State Bar of Michigan*, 418 Mich ____ (1983), and the Court being of the view that further examination of certain activities of the State Bar is warranted, the following individuals are appointed to constitute a committee to conduct such further examination:

Otis M. Smith, Detroit; Joel M. Boyden, Grand Rapids; Angus G. Goetz, Birmingham; Dennis W. Archer, Detroit; Honorable James Lincoln, Harbor Beach; Elaine Fieldman, Detroit; Martha L. Seaman, Lansing; Sylvia A. James, Detroit; Mary M. Fowlie, Troy; J. Michael Fordney, Saginaw; Michael Brennan Farrell, Lansing; George Sinas, Lansing; Sen. Basil W. Brown, Senate Judiciary Comm.; Sen. Dan L. DeGrow, Senate Judiciary Comm.; Rep. Perry Bullard, House Judiciary Comm.; Rep. John G. Strand, House Judiciary Comm.; Honorable John H. Hausner, Wayne Circuit Court

Specifically, this committee is charged with the duty of examining and making recommendations concerning the following activities of the State Bar:

1) the provision of information and assistance with regard to programs relating to prepaid legal services;

2) the maintenance of lawyer placement services;
3) the taking of positions before the Legislature on subjects which could form the basis for legislative action; and
4) such other activities as the committee deems appropriate for examination.

The committee is hereby requested to provide this Court with its report and recommendations as to these matters on or before July 31, 1984.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 31st day of January in the year of our Lord one thousand nine hundred and eighty-four.

/s/ CORBIN R. DAVIS
Clerk

SEAL

Judge James H. Lincoln, Retired
1829 S. Lakeshore
Harbor Beach, Michigan 48441
517-479-6310

March 27, 1982

Honorable Mary S. Coleman
Chief Justice, Supreme Court of Michigan
P.O. Box 30052
Lansing, MI 48909

RE: *Falk v. Bar*

Dear Chief Justice Coleman:

The Hearing Officer herewith submits the report on Falk v. Bar.

The Supreme Court did not indicate that the Hearing Officer should file a summary of the testimony of each witness along with the finding of facts and recommendations. No summary of testimony had been filed by Judge Schoenberger. However, this Hearing Officer thought such a summary of testimony might be of some use to the Supreme Court, particularly if agreement on the summary could be reached between the Hearing Officer, the Plaintiff and the Defendants.

It has now become necessary to sumit the Hearing Officer's report without the summary of the testimony of each witness.

Mr. Falk's proposed summary arrived in the middle of February. The Hearing Officer had hoped to receive both proposed summaries by an earlier date. However, Mr. Bushnell's proposed summary of testimony of each witness has not yet arrived.

It is impossible to develop a summary of the testimony of each witness without requesting another adjournment.

No matter what summary of testimony the Hearing Officer

finally submitted, there would be numerous exceptions taken to it which would have to be resolved by the Supreme Court by reference to the transcript.

The Hearing Officer did not feel justified in asking another adjournment to carry out a task not indicated by the Supreme Court. Furthermore, the Supreme Court has numerous Commissioners to perform this task *if it is deemed necessary.*

Both Mr. Falk and Mr. Bushnell have been exceedingly cooperative in assisting the Hearing Officer with the fact-finding hearings even though their area of agreement is rather limited.

The Supreme Court now has all of the necessary information and facts available for making a decision by using the "what," the "how" and the "by other means" approach.

The assignment is much appreciated. The Hearing Officer is not seeking another assignment at this time. However, if another assignment from the Supreme Court is ever forthcoming, the Hearing Officer highly resolves not to get hospitalized and cause delay in completing the assignment.

Sincerely,
/s/ JAMES H. LINCOLN
Judge James H. Lincoln (Retired)
Hearing Oficer

Encl.
cc: Mr. Bushnell
Mr. Falk

REPORT OF HEARING OFFICER

Part I

Introductory Statement

1. *IT IS IMPORTANT THAT THIS REPORT BE READ AND UNDERSTOOD WITHIN THE FRAMEWORK OF TWO DOCUMENTS ALREADY FURNISHED BY THE HEARING OFFICER TO THE SUPREME COURT:*

A. Request for Directions from the Supreme Court dated May 27, 1981 (Judge James H. Lincoln, Retired).

B. Falk v. State Bar of Michigan, dated July 27, 1981 (Judge James H. Lincoln, Retired).

2. THE HEARING OFFICER IS AWARE THAT IF THE CASE IS TO BE DECIDED LARGELY ON THE BASIS OF THE OBJECTIVES OF THE BAR ACTIVITIES THAT THERE WAS LITTLE NEED OF FURTHER FACT-FINDING AFTER THE 1978 HEARINGS HELD BY JUDGE MAURICE E. SCHOENBERGER.

3. THE MEASURE OF FACT-FINDING USED BY THIS HEARING OFFICER (LINCOLN) HAS BEEN BASED ON THE THEORY THAT THE *"WHAT"* AND THE *"HOW"* AND THE *"BY OTHER MEANS"* WOULD BE BALANCED AGAINST FIRST AMENDMENT RIGHTS AS THE MEANS OF DECIDING THE CASE. THERE IS NO OTHER WAY TO REASONABLY INTERPRET THE COURT'S ORDER TAKEN TOGETHER WITH THE THREE OPINIONS OF THE COURT.

4. THE HEARING OFFICER EXPRESSES NO PREFERENCE AS TO WHETHER OR NOT THE FALK CASE SHOULD BE DECIDED ON THE BASIS OF THE OBJECTIVES OF BAR ACTIVITIES OR BY WEIGHING THE "WHAT" AND THE "HOW" OF BAR ACTIVITIES AND "BY OTHER MEANS" AGAINST FIRST AMENDMENT RIGHTS.

The assignment given the Hearing Officer is to get the facts concerning the "what" and the "how" of Bar activities and also the facts concerning "by other means."

5. *WHAT HAS BEEN THE SCOPE AND THE DEPTH OF FACT-FINDING BY THE HEARING OFFICER?*

A. Mr. Bushnell expressed concern that one opinion by the Supreme Court indicated a possibility that an order might be entered approving certain Bar activities and then forbidding all other Bar activities. The first hearing had not covered all Bar activities and such an order would cause no little anguish because some activities might be outlawed under such an order without giving the Bar a chance to present their case. (Even paying the bonds on the Bar Building is a Bar activity.) While the Hearing Officer was considering whether or not to ask the Supreme Court for instructions relating to this, other considerations presented themselves.

B. The Supreme Court had directed the Hearing Officer (Lincoln) to make a fact-finding report on lobbying. Bills pending in the State Legislature were being assigned to many of the committees of the State Bar depending on the subject matter of the legislation. Thus it appeared that many if not most of the Bar committees might be involved in lobbying and that some testimony should be taken on these committees. At one point the Hearing Officer debated cutting the hearing short but decided not to do so. Judge Schoenberger could not foresee what additional information might be needed. Neither could this Hearing Officer. So testimony has been taken on all of the committees as well as a number of witnesses from other states that have voluntary Bar Associations. Every effort has been made to get the complete picture before the Supreme Court.

C. The Supreme Court had not defined requisite states' interest within the framework of the "what" and the "how"

and the "by other means" measure for determining First Amendment rights. ***FOR THE PURPOSE OF THE FACT-FINDING HEARINGS, THE HEARING OFFICER DEFINED REQUISITE STATES' INTEREST IN THE MEMORANDUM OF JULY 27, 1981.*** The three-part definition was helpful as a guide to fact-finding. It encouraged very penetrating fact-finding rather than surface fact-finding. The testimony taken at the fact-finding hearing is lengthy. It is broad in scope and has considerable depth.

6. THE SUPREME COURT NOW HAS AVAILABLE SEVERAL THOUSANDS OF PAGES OF TRANSCRIPT RELATING TO BAR ACTIVITIES TOGETHER WITH A LARGE STACK OF EXHIBITS. *IN WHAT FURTHER MANNER CAN THE HEARING OFFICER SERVE THE SUPREME COURT?*

A. There was no disputed evidence taken by Judge Schoenberger in 1978, and there was no indication that an in-depth probe of Bar activities was needed. Judge Schoenberger's report was fairly simple.

B. In the fact-finding hearing held by this Hearing Officer (Lincoln), there is disputed testimony. Also, there is much opinion testimony. There is no clear line between opinion and fact.

C. The Supreme Court has not given any guidelines as to how far the Hearing Officer should go in making this report. The fact that the guidelines for making this report are almost non-existent does not bother the Hearing Officer. ***The Hearing Officer does not intend to spend any time trying to decide what is fact and/or opinion, etc. The Hearing Officer will make such finding of fact, express such opinions and recommendations as he thinks might be helpful to the Supreme Court in deciding the case.***

REPORT OF HEARING OFFICER

Part II

Discussion, Fact-Finding, Conclusions and Recommendations

DEFINITION OF REQUISITE STATES' INTEREST SET FORTH IN MEMORANDUM OF JULY 27, 1981

1. The three-part definition has served a useful purpose, for it has furnished a framework for the hearings. Any definition used by the Supreme Court will probably fall somewhere within the boundaries of this definition if the "what" and "how" and "by other means" approach to decisions is used. It is not as difficult for the Bar to meet as the measure used in Justice Ryan's opinion, but it is the next thing to it.

2. *There are numerous possibilities:*

A. That the definition be adopted as written.

B. That no part of the definition be used.

C. That part of the definition be used and part not used.

D. That the decision be made without writing a definition. of "requisite states' interest." The Hearing Officer believes that in some U.S. Supreme Court decisions, they discuss the facts and then hold that the facts either show or do not show requisite states' interests. No specific definition is used. *This would be the easiest way to write the decision.*

E. That the Hearing Officer's definition be used as a test for Bar activities such as lobbying that are severe infringements of the First Amendment and *not* be used on more benign infringements such as support of *Law Day.*

Many of the activities of the Bar infringe on the First Amendment because of the *forced association only* such as the educational programs or Law Day. However, lobbying infringes not only because of *forced association* but also infringes because of *beliefs.* A review of the numerous activities of the Bar indicates that there is a very real distinction between these

two types of infringements. In most cases this dividing line is fairly clear and sharp between these two types of infringements. In some cases the dividing line is not clear and sharp.

Example I: Some educational programs will not be objectionable from the point of view of beliefs, but applying for federal funds to finance them may be objectionable on political grounds.

Example II: Mr. Falk states "As Law Day is a substitute for International Labor Day ("Red May Day"), it may have political overtones."

If such overtones exist, they would not be sufficient to place Law Day in the classification of Bar activities that infringe on both "forced association" and "belief." "May Day" has overtones. In World War II a "May Day" radio message from a nearby ship had overtones. To some people, May Day means dancing around a May pole. It is possible to assert a political overtone or "belief" factor in any activity under the sun.

There are some activities that fall between the two examples given here. The fact remains that there are two distinct types of infringements.

It may be logical to apply the same test to all infringements on the First Amendment. *But with perfect logic one may proceed along to the grand fallacy.* To apply as demanding and restrictive a test as the Hearing Officer has proposed for severe infringements that encompass both *forced association* and of *belief* such as lobbying falls within the bounds of reality, but to apply such a demanding test to more benign infringements that infringe *because of force association only*, such as Law Day or educational programs, does not conform to reality.

One solution might be simply to use a very demanding test such as the Hearing Officer has proposed for severe infringements that infringe because of both *forced association* and *belief* and then use no definition as to benign infringements or activities that infringe because of *forced association only.* Just

assert that the facts relating to benign activities either do or do not show compelling states' interests. If this method is good enough for the U.S. Supreme Court, it is good enough for this Hearing Officer.

It should be pointed out that no matter what the activity may be, there will always be one or two or more members of the Bar who may assert that they object on the grounds of belief as well as forced association, and that the First Amendment rights were written for every single individual regardless of whether or not the rest of the 225 million people disagree. True! But the U.S. Supreme Court says that the First Amendment is not an absolute and where to draw the line is what the Falk case is all about.

THE HEARING HAS USED THE PROPOSED THREE-PART DEFINITION OF REQUISITE STATES' INTEREST AS A GUIDE TO FACT-FINDING. *THERE APPEARS TO BE NO GOOD REASON FOR NOT USING THE DEFINITION AS A GUIDE TO MAKING THIS REPORT.*

1. It is the best and also the worst definition ever written in the context of weighing the "what" and the "how" and the "by other means" against First Amendment rights.

2. No one who has written a definition in this context has criticized the proposed definition. The definition proposed by the Hearing Officer may appear more attractive when alternatives are suggested.

It appears to the Hearing Officer that the best course of action is to continue to use the proposed three-part definition as it relates to lobbying in this report. If a less restrictive definition is adopted by any member of the Supreme Court, there is still no reason why this report will not be equally useful. Many of the findings of fact in this report will be useful no matter what definition is used.

The Falk case was never assigned to a trial court for decision. If the Hearing Officer were sitting as a trial judge, much of what is written in this report as observations and recom-

mendations concerning requisite states' interest would be incorporated in the trial court's written decision.

Young Lawyers Section

There is no disputed evidence as to what the Young Lawyers Section is actually doing. What it all boils down to is that the Young Lawyers Section is engaging in the same types of activities as the rest of the Bar. The Young Lawyers seem to be more active than the rest of the Bar.

The Young Lawyers Section has operated as a *forced association* within a *forced association.*

Admittedly, the forced association of being a member of the Young Lawyers Section has rested gently on its members. Other than getting a little more mail from the Bar many would not even have an awareness of being a member of the Young Lawyers Section.

There is no good reason for forcing anyone being in the Young Lawyers Section if they do not so desire.

It is recommended that the Bar be directed to include a notice anually (one-fourth page or more) informing members who qualify for the Young Lawyers Section that upon request their names will be removed from those listed in the Young Lawyers Section.

All activities of the Young Lawyers Section should stand or fall (such as education or lobbying activities) along with similar activities of the Bar. When the Young Lawyers Section is no longer a forced association, then the measure of whether or not its activities are permissible is measured in exactly the same way as other similar Bar activities.

The transcript of the hearings contains testimony relating to the following committees of the Young Lawyers Section:

Witness	*Committee or Activity*
John McSorley	Chairperson, 1980-81
	ABA Award of Achievement Competition

Donald Gasiorek	Moot Court Committee
James Colbert	Basic Skills Committee
Hon. Michael Harrison	Chairperson, 1975-76 Law Education Programs
John Minock	Child Advocacy Committee
Mary Kay Skullion	Prison Paralegal Project
Frederick Baker	Sixty-Plus Clinic
Michael Legg	Law Office Visitation Day Program
Lawrence Nolan	Supreme Court Admissions Trip Travel and Tours Committee Prepaid Legal Services Committee
Larry Powe	Publications Committee Committee on Alternatives Within the Practice of Law Credit Union Committee
Henry Clay	Annual Meeting Committee
Daniel Stepek	Chairperson, 1977-78 Labor Arbitration Qualification Program
Marc Shaye	Chairperson, 1979-80
John McSorley (recalled)	Scope Committee *Inter Alia* (newsletter)

Most any committee of the Bar, whether or not the committee is part of the Young Lawyers Section, may have some legislative proposal assigned to it for recommendation. However, the Young Lawyers Section is concerned mainly with educational activities — in the broad sense of the word.

Lawyers' Wives

The Supreme Court appears to have approved Law Day activities. The Lawyers' Wives has long promoted an extensive

Law Day program including arranging for essay-writing contests in schools. The value of the time and effort expended is considerable. There is certainly a states' interst in keeping a strong, active Lawyers' Wives organization to promote such programs. If the Lawyers' Wives don't do it, then it will not be done. There is testimony on the record of other activities of the Lawyers' Wives that is "public interest" activity.

It is recommended that the State Bar be permitted to give the Lawyers' Wives a sum not to exceed $5,000 annually, plus a factor for inflation. This payment may be made so long as the Lawyers' Wives continue their Law Day activities and more specifically that they continue to promote the Law Day essay contests in Michigan schools.

The Lawyers Placement Service

If the full cost of the operation were borne by those who used the service, it would not be a cost that would be oppressive — at least by comparison with tuition rates in law schools. (The Hearing Officer has one daughter who has just finished law school at the University of Arizona and passed the Arizona Bar and another daughter who is in her last year of law school here in Michigan. The Hearing Officer admits being prejudiced by evidence not on the record.)

The fact of the matter is that attorneys — even those who have just graduated from law school — are quite capable of finding the modest amount of funds necessary to use the Lawyers Placement Service and bear the full cost thereof.

The Hearing Officer could find nothing that is convincing in the evidence to show why attorneys who use the Lawyers Placement Service should not bear the full cost of the operation.

It is recommended that the Court direct the Bar that none of the costs of the Lawyers Placement Service be paid from mandated Bar dues.

The Commercial Sale of the Bar's Mailing List

It is recommended that the Bar be directed to allocate not

less than one-fourth page in the Bar Journal once a year to inform members that they may have their names removed from the mailing list being used for commercial purposes.

NOTE: It would be good public relations for the Bar to inform the membership once a year that all these travel ads, etc. that they are receiving are not paid for by Bar dues and that the sale of the list is an economic plus for the Bar. Some members at the present time are not aware of these facts and have complained to the Hearing Officer that they receive a lot of junk mail from the Bar. Some members of the Bar are not interested in taking the trips advertised in the literature mailed to them.

THE BAR'S ACTIVITIES ADDRESSED TO INFLUENCING LEGISLATION

Technical Assistance by the Bar in Helping the Legislature Draft (Wording) Legislation

1. From time to time members and/or committees of the State Legislature request aid of the Bar in drafting legislation. It is not implied that the Bar either supports or opposes this proposed legislation. The Legislature is merely using the resource that the Bar has of *experienced attorneys who know how legislation works in practice as well as in theory.*

2. The need for massive input of experienced attorneys at the drafting of legislation is discussed in the *Memorandum dated July 27, 1981,* submitted by this Hearing Officer, and there is considerable evidence in the record that will bear this out.

3. There are about 13 attorneys (staff) drafting about 2,000 pieces of legislation for the Legislature in one session. These attorneys are certainly well-qualified, but for the most part the work of drafting legislation for the State Legislature is not looked upon as a career. The witness produced by Mr. Falk said she passed the Bar three years ago. She was competent. However, advancement lies elsewhere.

4. The basic problem is that those *now drafting legislation have frequently only an abstract idea of how it works out in practice.* Furthermore, the other agencies of government are equally short-handed and may be even more short-handed if their budgets are further reduced. There are but few attorneys in the State Legislature. The attorney input "by other means" is important and the Hearing Officer does not imply that attorney input other than the input by the Bar is not a valuable contribution.

However, the contribution made by the Bar is not only desirable but it has an important states' interest. There are no other means available other than the Bar for making the contribution now being made by the Bar.

5. Legislation that is fairly well-drafted but that could have been better drafted can cause unnecessary litigation expenses and is a burden to the citizens. It is important to the public to have legislation drafted as well as possible.

6. The Bar funnels valuable assistance to the State Legislature in drafting legislation and there is a depth of practical experience with how law operates in actual practice that will not in fact be available unless the Bar continues to assist in giving technical aid in drafting legislation.

7. It is impossible to give much technical assistance in drafting legislation without stepping over the line from time to time and changing the substance of the legislation. *However, it is not implied that the Bar endorses any legislation by reason of the fact that technical aid has been given.*

It is the Hearing Officer's opinion that if the Court permits lobbying for the substance of legislation, the Court should also permit the Bar to give technical help in drafting legislation for the State Legislature. If the Court forbids the Bar to lobby for the substance of legislation, then the Court should forbid the Bar giving technical aid to the State Legislature in drafting legislation.

There is a distinction between the two kinds of activities.

However, the facts are such that the two activities should stand or fall together. It is the Hearing Officer's opinion that technical aid in drafting legislation should be considered under the broad definition of influencing legislation. "Influencing legislation" implies a somewhat broader scope of activity than the term "lobbying." The objective of technical help does not imply either support or opposition. There might be a case made for drawing the First Amendment line between the two types of activities. However, the Hearing Officer thinks this would be impractical to a point of being bad law.

Social Functions

There is very little in the several thousand pages of transcript relating to social functions of the Bar because the Bar has very few social functions. There is no evidence whatsoever that anyone was ever drunk or disorderly at one of the Bar's social functions.

The Hearing Officer has lectured in over 30 states in the Union and often the Bar puts on a cocktail party or dinner in connection with these programs. Everyone arrives with a ten-dollar bill and the Ten Commandments and goes home without breaking either one.

It is absurd to say or even imply that any member of the Supreme Court is going to be corrupted or even that a Supreme Court Justice appearing at a Bar function gives the slightest appearance of impropriety.

THERE WERE ONLY TWO SOCIAL FUNCTIONS THAT WERE PUT ON BY THE BAR:

1. The annual meeting of membership: The tickets are paid for by those attending the meeting and no First Amendment rights are involved;

2. When the Chief Justice gave his/her addres on the State of the Judiciary, there was a social event involving the Judicial and Legislative Branches of the Government. This

involved the Justices of the Supreme Court, the Bar Commissioners and also members of the State Legislature.

This social event was financed by mandatory Bar dues. Such an event helps keep the wheels of government turning as between the Legislative and Judicial Branches of Government. The Plaintiff is correct in asserting that this social event is political in nature. The resources that the Courts now have in Michigan did not just happen. Nor did the improvement in the judicial system over the past few decades just happen. These improvements would not have come about except by a great deal of effective lobbying.

For thousands of years mankind has used social events to get more attention on problems and to help create a climate where individuals will listen.

There probably is little or no specific lobbying done at this social event. Like Law Day, this social event even over a period of years can be given no exact value. The event may well be something of a bore to some who attend (not all), but this is not the point.

The fact that the event has taken place is a reminder to legislators that the judiciary and the Bar share with them the common objective of making the legal system work in a free society — and this should be sufficient states' interest for one social event a year if lobbying is determined to be a permissible activity.

Should a member of the Supreme Court accept a free ticket or free invitation to this or any other Bar-sponsored event?

It is recommended that each member of the Supreme Court make this decision individually and not attempt to impose their views on other members of the Court. Each Supreme Court Justice who cares to attend may individually pay or not pay the cost of the food and refreshments (if such there be) to the Bar as each Justice chooses.

Justice Levin's opinion indicated he wanted more facts to be developed relating to social events used for lobbying. There are

few facts available other than produced at Judge Schoenberger's hearings.

What it amounts to is that the one social event that was put on each year that was financed by Bar dues was clearly lobbying.

If lobbying is permitted by the use of mandated Bar dues, then this event should be permitted in exactly the same manner as other lobbying. If the Supreme Court chooses to outlaw lobbying with mandated Bar dues, then this social event should not be permitted if financed by mandated Bar dues.

The pork and shellfish problem is not within the Hearing Officer's area of expertise, and there is little on the record to help solve the matter. It is an argument that does not seem to merit extensive consideration except in theological circles. The Plaintiff is not being forced to eat any food that is forbidden by his religious beliefs. If the Plaintiff were being forced to eat pork or shellfish or if this were all that was served, then this would certainly be a very serious issue.

The Bar's very limited social functions clearly serve a public interest.

If the Supreme Court approves of the Bar lobbying with mandated Bar dues, it is then *recommended that the Supreme Court indicate to the Bar that they may continue to sponsor (with mandated Bar dues) the social events that were sponsored prior to the filing of the Falk case.*

LOBBYING AS APPLIED TO THE THREE-PART DEFINITION SET FORTH IN THE MEMORANDUM OF JULY 27, 1981

1. Lobbying is by far the most serious infringement of First Amendment Rights of any activities carried on by the Bar. Lobbying is the most difficult activity to be constitutionally justified of any of the major activities carried on by the Bar. Certainly the educational activities of the Bar are justified by using the three-part definition proposed by this Hearing Officer.

2. The Hearing Officer proposes to discuss the subject of lobbying in a different order or sequence than the three-part definition that was proposed in the Memorandum dated July 27, 1981.

The order or sequence in which the three-part definition will be applied to lobbying in this report will be as follows:

1. Substance of Bar activity;
2. The "by other means" test;
3. Procedures impacting lobbying activities.

SUBSTANCE OF BAR ACTIVITIES

UNLESS OTHERWISE INDICATED, IN ORDER FOR BAR ACTIVITIES TO HAVE REQUISITE STATES' INTEREST SUFFICIENT TO OVERRIDE FIRST AMENDMENT RIGHTS, THEY MUST BE ACTIVITIES WHICH IF ELIMINATED WOULD SUBSTANTIALLY AND ADVERSELY ALTER THE MAINTENANCE AND EVOLUTION OF THE SOCIETY IN WHICH WE LIVE.

Comment: "Unless otherwise indicated" encompasses minor activities already discussed. Some are not serious infringements on First Amendment rights. They impact forced association but do not infringe on belief except for a very few members who might state any activity infringes on their beliefs.

Educational activities of the Bar are not minor, and if the Bar does not carry on these educational activities, then they will not be done. Educational activities meet the three-part definition proposed by the Hearing Officer. However, this portion of the Hearing Officer's report is directed at lobbying.

In taking the measure of lobbying activity, the following should be weighed in the scales:

1. The number of bills lobbied each year either for or against is relatively small in number.

2. The measure of the impact of lobbying should be viewed over a long period of time — 50 or 100 years or more. There is

a more complete discussion of the "time" factor in the Memorandum of July 27, 1981.

3. There is no effective way or short cut to making a judgment concerning the impact of lobbying by the Bar without looking at a sizable portion of the transcript and the exhibits.

4. If one were to read the testimony of John Robert Dethmers in its entirety and also look at the exhibits admitted into evidence to support his testimony, then one would be undertaking a lengthy and somewhat tedious task. Yet this course of action may be necessary to understand the role the Bar has played in bringing about a much-improved judicial system in Michigan over the past several decades.

Certainly it is impossible to separate out all the factors and forces that brought about a much-improved court structure and other improvements. Success has a thousand fathers, but failure is an orphan.

However, Mr. Dethmers did establish that the Bar played a very important role. This is one example that hits the center of the target of the first part or the first requirement of the three-part definition proposed by the Hearing Officer.

5. The Bar endorses and promotes and opposes legislation of many kinds and degrees of importance. However, what is to be weighed in the scales is the sum total effect of all legislation promoted or endorsed or opposed by the Bar over a long period of time (50 or 100 years).

IT IS ASSERTED BY PLAINTIFF THAT SELF-INTEREST OF THE BAR OR SELF-INTEREST OF ITS MEMBERS IS OFTEN THE DETERMINING FACTOR IN THE LEGISLATION PROMOTED BY THE BAR RATHER THAN INTEREST OF THE PUBLIC.

1. There can be no gainsaying that lawyers are motivated to act in their own self-interest quite as much as any other profession.

2. It would be expected that sometimes endorsements by

the Bar may have been influenced by the self-interest of attorneys rather than the public.

3. However, if the legislation is beneficial to the public, it should not be condemned because it is in the self-interest of some attorneys to see the legislation passed. Thus it would seem that legislation should be measured by the value to the public whether or not it promotes or retards the self-interest of attorneys.

4. It would appear that most of the legislation either endorsed or opposed by the Bar has little or no effect on the self-interest of attorneys.

5. One strong safeguard against self-interest actions by the Bar is the diversity of types of practice and of experience that members of the various committees of the Bar possess. There is an abundance of testimony in the record to support this statement.

6. However, Mr. Falk has raised a valid point. At the conclusion of this report, the Hearing Officer will make recommendations that if adopted will give additional assurance that it will be for the public good and not the good of the Bar or any segment of the Bar that determines the support or opposition of the Bar to proposed legislation.

WHAT SPECIAL INPUT DOES THE BAR HAVE TO OFFER CONCERNING PROPOSED LEGISLATION?

1. The Bar works through its numerous committees.

2. The Bar committees are composed of a cross-section of attorneys. The Bar committees are *not* composed solely of prosecutors or solely of defense attorneys, nor of insurance attorneys, nor of corporation lawyers or whatever. The Bar committees are composed of a mix of attorneys who look at legislation from many points of view and a diversity of experience.

3. Each committee of the Bar has members, the sum total of which represent decades of various types of practice and

practical application of the law and also a wide variety of living besides their years of academic training. Obviously the Bar committees present a far different type of input into proposed legislation than comes from attorneys who represent one segment of the Bar only. This is not to say that various groups of attorneys who represent a particular point of view such as a prosecutor's association, etc., do not have valuable input. They do.

However, the input by the Bar through its broadly based committees, together with the review by the commissioners, is a contribution that is unique and far more extensive than the input from other sources of the legal profession.

4. *THE BASIC QUESTION BEFORE THE COURT AS IT RELATES TO LOBBYING BY THE BAR GOES TO THE QUESTION OF WHETHER OR NOT BROADLY BASED COMMITTEES OF ATTORNEYS, THROUGH THEIR ACADEMIC TRAINING, THROUGH THEIR YEARS OR DECADES OF EXPERIENCE IN THE PRACTICAL APPLICATION OF THE LAW, THROUGH THEIR DIVERSITY IN TYPES OF PRACTICE AND LIVING EXPERIENCE, PRODUCE A PRODUCT OR RECOMMENDATION CONCERNING LEGISLATION, WHEN APPROVED BY THE BAR COMMISSIONERS, THAT HAS A SUBSTANTIAL AND UNIQUE VALUE TO THE PUBLIC.*

THE HEARING OFFICER HOLDS THAT CONSIDERING THE ENTIRE RECORD IN THIS CASE INCLUDING THE EXHIBITS THAT THE REQUIREMENTS OF THE FIRST PART OF THE THREE-PART DEFINITION (SUBSTANCE OF BAR ACTIVITIES) AS IT RELATES TO LOBBYING HAS BEEN MET BY THE BAR ASSOCIATION.

THE "BY OTHER MEANS" TEST

UNLESS OTHERWISE INDICATED, NO BAR ACTIV-

ITY WILL BE PERMITTED WHEN ALTERNATE MEANS ARE AVAILABLE THAT:

1. ARE LESS OFFENSIVE TO OBJECTING PARTIES, AND

2. ARE IN FACT ACCEPTABLE SUBSTITUTES IN THAT THE ALTERNATE MEANS MUST SUBSTANTIALLY CARRY OUT THE ACTIVITIES OF THE BAR.

In the Memorandum of July 27, 1981, the Hearing Officer stated that the issue of the Falk case relating to lobbying might be stated in terms of massive vs. minimal legal or attorney input as far as lobbying is concerned.

THE HEARING OFFICER MAKES THE FOLLOWING FINDING OF FACT:

The input by the legal profession from all resources other than that contributed through the State Bar of Michigan is but a fraction of the input into legislation that is now being furnished by the State Bar of Michigan.

Further, there is no substantial possibility of developing resources in the foreseeable future outside of the State Bar of Michigan that will be an acceptable substitute or that will substantially carry out the lobbying activities now being carried out by the State Bar of Michigan.

Resources outside of the Bar do not furnish the broadly based committee input that is so unique and so valuable. Nor are the resources outside of the Bar in a position to screen or review several thousands of different pieces of proposed legislation each year. The resources outside of the Bar are important and make a valuable contribution, but they can never be a suitable substitute for the input into legislation being made by the State Bar of Michigan.

The Hearing Officer makes the above findings of fact at a time when the records and exhibits of this case clearly show that the number of registered special interests lobbyists has grown apace in Michigan. The amount of special interest

lobbying far exceeds the amount of special interest lobbying of a decade or so ago. Thus the public interest need for the input of broadly based committees of the Bar into legislation has grown apace over the years. The testimony indicates that the Bar has also improved its methods of working with the Legislature.

THE MORE DIFFICULT QUESTION IS WHETHER OR NOT THE LOBBYING ACTIVITIES OF THE BAR COULD NOT BE CARRIED ON BY A VOLUNTARY BAR WITHOUT BEING SUBSTANTIALLY DIMINISHED.

1. It would appear from the three opinions already handed down by the Court in the Falk case that there will continue to be a forced association or mandatory Bar concerning some activities.

2. The question then resolves itself as to what would hapen if members of the Bar in a forced association are asked to make a voluntary contribution to finance lobbying or whatever else may be outlawed by the Supreme Court from being financed by mandatory dues.

3. There is much testimony and discussion in the transcript relating to this question. There is a wide difference of opinion between Mr. Falk and Mr. Bushnell as to what the testimony shows. The Hearing Officer sees no good reason to get additional testimony for the evidence would be only cumulative of that which is already on the record.

4. There are many factors to be considered in making a judgment as to whether or not there would be a substantial decrease in either lobbying or effectiveness of lobbying by the Bar if this activity can no longer be supported by mandatory dues:

The definition of "by other means" proposed by the Hearing Officer would require that there would be a substantial decrease in lobbying and/or effectiveness of lobbying by the Bar over decades of time if mandatory financing is withdrawn in order

for the Bar to meet the Hearing Officer's requirements of requisite state interest. Obviously it would be possible to change this requirement as drafted by the Hearing Officer so that if all other requirements would be met and if resources outside of the Bar could not replace Bar activities, this would be sufficient. It would then be irrelevant whether or not the activity could be financed by voluntary funds. This possibility is suggested because there was not clear mandate from the Court on this point. *In fact, the Court seemed to indicate a probe in depth into possible resources outside of the Bar as perhaps the only range of questioning into the "by other means."* If the Court so holds, then a sizable part of the transcript and of this report need not be considered. It is very clear that resources outside the Bar will never substitute for but a small fraction of the attorney input into legislation furnished by the Bar.

LET US RETURN TO THE DEFINITION THAT THE HEARING OFFICER PROPOSED RELATING TO "BY OTHER MEANS."

1. We are not making a judgment of what would occur in a year or two if mandatory funding for lobbying were withdrawn. We are making a judgment of what would occure over decades of time.

2. The funding available for lobbying might be different if the Bar were entirely a voluntary Bar, as compared to a Bar that is a forced Bar for some activities such as financing the disciplining of attorneys but a voluntary Bar from the point of view of financing-lobbying — *a bifurcated Bar.*

3. A completely voluntary Bar might charge a lump-fund membership fee and then allocate funds to disciplining attorneys and more to lobbying. All sorts of possibilities present themselves the results of which are difficult to measure.

4. However, the situation presented by a bifurcated Bar is certainly different from the situation presented by either a

completely forced funded Bar or a completely voluntary Bar.

5. The annual bill sent out by the Michigan Bar demands $150.00 for long-time members and something less for newer members. However, the bill also contains numerous categories or listings of sections that an attorney may or not join for a stated sum if he/she so desires.

Now, what would occur over a period of decades if the Bar dues were lowered by the amount of the sum now used for lobbying, etc. and another category added to the Bar bill where attorneys could donate to the support of lobbying if they so chose? Who knows what would happen if the matter were handled in this way or in other possible ways? *It is possible to reach some general conclusion from the evidence.*

Witnesses testified that they become involved in Bar activities because the Bar was a mandatory Bar and might not have become involved otherwise. It is very clear that lobbying activities are not going to be increased by withdrawing mandatory support. Even the plaintiff does not so contend.

There are pages of transcript relating to the matter under discussion. The Hearing Officer has spent considerable study time and reflection on this matter before making a finding of fact.

The Hearing Officer makes a finding of fact that considering all the testimony and the exhibits, that to withdraw mandatory financing of Bar lobbying activities would result in a substantial decrease in the amount and the effectiveness of lobbying by the Bar over a period of decades, and more specifically there would be a substantial decrease in attorney input into proposed legislation over a period of decades.

THE HEARING OFFICER HOLDS THAT THE "BY OTHER MEANS" STANDARD AS PROPOSED AND DEFINED BY THE OFFICER IS RESOLVED IN FAVOR OF THE BAR AND MANDATORY FINANCING OF LOBBYING.

PROCEDURES IMPACTING BAR ACTIVITIES

1. The numerous questions raised in Justice Levin's opinion in the Falk case would indicate that it is not sufficient to meet First Amendment requirements for the bar to duplicate procedures similar to the State Legislature. This conclusion is reached because the hearing held by Judge Schoenberger established that the Bar followed pretty much the same procedures as the Michigan State Legislature or the ordinary procedures of a legislative body. *Something more is required of the Bar.*

2. The Hearing Officer (Lincoln) wrote a proposed requirement relating to procedures into the three-part definition of requisite states' interest in the Memorandum of July 27, 1981.

"EVERY PRACTICAL PROCEDURAL CONSIDERATION THAT IS ADVANTAGEOUS TO OBJECTING PARTIES WILL BE REQUIRED OF THE BAR."

The Hearing Officer makes a finding of fact, based on the request for additional information by Justice Levin in his opinion and on the procedural requirements set forth by the Hearing Officer in the Memorandum of July 27, 1981, and on all the records of this case, that the State Bar of Michigan does *not* meet the procedural requirements of the First Amendment as these requirements related to influencing legislation (on lobbying).

IT IS RECOMMENDED THAT THE STATE SUPREME COURT ORDER THE STATE BAR OF MICHIGAN TO EITHER CEASE FINANCING ANY ACTIVITY WITH MANDATORY BAR DUES THAT RELATES IN ANY MANNER WHATSOEVER TO INFLUENCING LEGISLATION OR LOBBYING IN THE BROADEST DEFINITION OF THE TERM OR TO COMPLY WITH THE PROCEDURAL REQUIREMENT HEREIN LAID DOWN.

STATE BAR PROCEDURES REQUIRED TO CARRY

ON LOBBYING ACTIVITIES SHALL INCLUDE THE FOLLOWING:

First Procedural Requirement

The State Bar of Michigan shall neither support nor oppose any particular legislation or do any lobbying whatsoever relating to any proposed legislation without the approval of not less than *three-fourths* of the members of the Board of Commissioners present at the meeting that passes upon the proposed legislation. Whenever the vote is not unanimous, there shall be a roll call vote and the vote of each commissioner shall be recorded in the minutes of the meeting.

(This rule does not apply to technical assistance by the Bar in drafting legislation.)

Second Procedural Requirement

NOTICE OF BAR COMMISSIONERS MEETINGS THAT DISCUSS AND/OR VOTE ON MATTERS RELATING TO INFLUENCING LEGISLATION;

OPPORTUNITY OF ALL MEMBERS OF THE BAR TO GIVE INPUT INTO DECISIONS OF THE BAR TO SUPPORT OR OPPOSE LEGISLATION;

PROCEDURES MUST ENCOURAGE INDIVIDUAL MEMBERS OF THE BAR TO EXPRESS THEIR OPINION ON LEGISLATION AND ALSO ASSURE MEMBERS THAT THEIR VIEWS WILL BE GIVEN CONSIDERATION;

DISPELLING ALL POSSIBILITY OF ANY AURA OF SECRECY CONCERNING BAR PROCEDURES AND DECISION-MAKING BY TOTAL OPENNESS, BY WELCOMING INPUT BY INDIVIDUAL MEMBERS OF THE BAR AND BY GIVING EACH BAR MEMBER TIMELY NOTICE AND INFORMATION PRIOR TO ANY MEETING OF THE COMMISSIONERS IN WHICH LOBBYING MATTERS ARE TO BE DISCUSSED AND/OR PASSED UPON.

(This rule does not apply to technical assistance by the Bar in drafting legislation.)

There shall be mailed to each member of the Bar a *special mailing* prior to any meeting of the Bar Commissioners in which any lobbying matter is to be either discussed or passed upon. This special mailing to each member of the Bar shall include information covering the following matters:

1. A complete agenda for the next Commissioners' meeting including the time, date and place. The mailing shall be posted at the earliest possible date and in sufficient time to give members an opportunity to respond.

2. The agenda enclosed in this special mailing shall list all legislative and/or lobbying matters to be taken up at the next Commissioners' meeting together with a brief statement sufficient to inform the members of the Bar concerning the nature of each piece of legislation.

3. There shall be included in each of these mailings a statement that each member of the Bar is not only welcome to express his/her opinions but encouraged to do so by either attending the meeting, or by letter, telegram or phone call, etc.

4. Whenever there is a roll call vote of the Commissioners (as set forth in the First Procedural Requirement), the results of this roll call vote shall be set forth in the next agenda notice of the Commissioners' meeting mailed to the Bar membership.

Third Procedural Requirement: Technical Assistance

The procedures governing other lobbying activities set forth in this report do not apply to technical assistance given by the Bar in drafting legislation.

THE PROCEDURES GOVERNING THE GIVING OF TECHNICAL ASSISTANCE SHALL INCLUDE THE FOLLOWING:

1. No technical assistance may be given except by written permission of the President of the Bar.

2. The written permission shall contain a statement that

the giving of technical assistance by the Bar does not imply either support or opposition to legislation. A copy of the letter giving written permission to give technical assistance shall be given to the chairman of the committee of the State Legislature requesting the technical assistance or the State Legislator or other person or official requesting the technical assistance.

3. A resume or report on all technical assistance given shall be made annually to the Bar membership. This report shall be included in one of the agendas mailed to each member of the Bar. (See Second Procedural Requirement.)

The Hearing Officer makes a finding of fact that if the State Bar of Michigan adopt the procedures set forth herein, that together with the present procedures (not conflicting with the procedures outlined in this report), that the State Bar will have met the procedural requirements set forth in the Memorandum dated July 27, 1981. This procedural requirement sets forth that: "Every *practical* procedural consideration that is advantageous to objecting parties will be required of the Bar."

Under the present operation of the Bar, the procedures mean very little to the Bar membership at large for they have no way of knowing what is going on — at least before the decisions are made.

The three-fourths vote requirement is not impractical. Such a rule will not harpoon the lobbying activity of the Bar. However, such a rule is an encouragement to dissenters to express their dissent. Suppose that 24 of the Commissioners are present at a meeting and some Bar member or a committee member of the Bar who objects to the majority report of the Bar committee wishes to press his/her objections before the Commissioners. Only 7 votes out of the 24 would be necessary to stop the Bar from taking a position. This is not an unreasonable or impractical rule where the matter of lobbying is concerned.

What the Hearing Officer has done is to recommend the adoption of rules that give the objecting parties every procedural

advantage and at the same time *not* made rules or procedures that would have the effect of making it impossible or impractical for the Bar to carry on activities of influencing legislation.

Furthermore, there is little point in giving Bar members procedural rights unless they are able to give input prior to the Commissioners' vote on any proposed legislation. Without giving prior and timely notice, all procedural rights amount to little more than giving a person the chance to catch a bus that has already pulled away from the curb.

REPORT OF [THE FIRST] HEARING OFFICER [THE HON. MAURICE E. SCHOENBERGER]

The above matter arises out of a Petition filed by Allan S. Falk, Plaintiff. The Petition contests the legality and the constitutionality regarding payment of State Bar dues. Specifically, Plaintiff objects to certain designated expenditures of the State Bar which he contends are for activities that are violative of his rights under the First Amendment of the U.S. Constitution, and Plaintiff requests that he not be required to pay such proportion of his State Bar dues as represent a pro rata share of said illegal expenditures vis-a-vis the total expenditures of the State Bar of Michigan.

On March 2, 1978, the Michigan Supreme Court appointed Maurice E. Schoenberger . . . "as a factfinder before whom the parties shall present evidence, including testimony on the issue Plaintiff raises. Former Judge Maurice E. Schoenberger shall make findings on any factual matters controverted by the parties and submit his findings to the Court."

Between the time of this Order and the hearing on June 5, 1978, under the supervision of the factfinder, Plaintiff Allan S. Falk, and the counsel for the Defendant, State Bar of Michigan, George E. Bushnell, Jr., agreed upon a procedure for discovery as it pertained to the State Bar of Michigan's annual budget. On June 5 and 6 a hearing was held taking two full days.

THE CASE OF THE STATE BAR

By a stipulation of counsel, the parties agreed to reverse the order of proofs and the State Bar of Michigan proceeded with its case first, and called as its first witness Mr. Michael Franck, Executive Director of the State Bar of Michigan. Mr. Franck, after giving his background and other preliminary testimony, explained that the State Bar of Michigan is a unified Bar which came into being by Legislative Act of 1935, said legislation authorizing the unification of the State Bar and the Supreme Court, and in which membership in the State Bar is a prerequisite to practice (page 23).

Following this was testimony relative to the structure and administrative makeup of the State Bar of Michigan (pages 23-45). There then followed the observation by Mr. Franck of the State Bar's growing awareness of its public responsibility and to be involved in public policy issues (page 49) and that this public policy involvement was thought to be germane to the life of the State Bar and the profession of law (page 50). Cross-examination on this preliminary testimony then followed.

On page 73, direct examination began of the State Bar's 1977-78 annual budget. The budget itself was not introduced as an exhibit in the hearing as it was already a part of the pleadings as an attached exhibit to Defendant's Answer to Petition for Special Relief. This budget is attached to this report. The format of the balance of the proceedings was direct examination by State Bar Counsel of Mr. Franck in the general area of revenue and in each of the categories contained within it, and then cross examination by the Plaintiff. After the testmony on revenue was concluded, there then followed (page 137) separate direct examination by the State Bar Counsel of Mr. Franck on each of the twenty-two (22) major categories under Expenditures in the 1977-78 Budget, plus direct examination in the area of Capital Expenditures and certain other accounting categories in the attached budget. After direct examination in each separate category, the Plaintiff

followed with cross-examination. Although cross-examination elicited certain testimony which amplified and sometimes clarified direct examination, at no time in the hearing was the actual dollar amount of the expenditures either challenged or questioned, and as such, the principal finding of fact is that the attached budget contains the accepted figures by both parties concerning both revenues and expenditures for the 1977-78 Budget.

It is worth noting in this report that as the Plaintiff proceeded with cross-examination on the various listed categories within the budget, it was clear that some were objectionable to him, and others were for legitimate functions of the State Bar as the Plaintiff perceived them, and as such were not objectionable. This is consistent with the Plaintiff's petition. However, after an exchange with the hearing officer, both counsel agreed that until the Michigan Supreme Court rendered the ultimate legal ruling on the issues raised by the Plaintiff, no attempt would be made to allocate as a percentage of overhead expenditures those considered to be objectionable (or illegal) vis-a-vis those considered to be legitimate expenditures, again as perceived by Mr. Falk (pages 159-161). This issue, of course, very possibly could be rendered moot, depending on the ruling of the Michigan Supreme Court.

The other witness called by the State Bar (in addition to Mr. Franck) was Mr. John Clark, a private practitioner from Petoskey, Michigan, a past president of the State Bar of Michigan, active on various committees in the American Bar Association, as well as a member and active in the American Judicature Society and other Bar-related organizations. Mr. Clark's testimony, which was taken during Mr. Franck's testimony for the sake of scheduling conveniences, consisted of direct examination by Mr. Bushnell, counsel for the State Bar, and cross-examination by the Plaintiff, Mr. Falk (pages 93-135). Mr. Clark's testimony was in the nature of opinion testimony gleaned from his background of participation in the State Bar and related

Bar organizations. The basic question that was put to him concerned the propriety of the expenditures by the State Bar to which the Plaintiff was objecting. Specifically, one such expenditure involved a reception given annually by the State Bar for members of the Michigan Supreme Court. Another concerned the appropriateness of the State Bar expenditures for activities in conjunction with the American Bar Association and other national legal organizations. Mr. Clark answered in the affirmative, that in his opinion such expenditures were related to and germane to the function of the organized Bar (pages 100-102) and then elaborated on his answer (pages 102-108). Mr. Clark also gave his opinion as to the value of the organized integrated Bar (pages 108-109).

There followed cross-examination in which the Plaintiff challenged the value (and legality) of expending State Bar monies for such items, among other things, as cocktail parties for members of the Supreme Court and Legislature, and for 'lobbying' by the State Bar, at least as the latter term was defined by the Plaintiff, in the State Legislature. The objection was also expressed by the Plaintiff at this time (although this was during cross-examination and not as a matter of proof) that State Bar monies were used for cocktail parties at which port was served, contrary to the Jewish dietary laws. Mr. Clark's testimony, as stated above, was virtually totally in the nature of opinion testimony based on his background, and accordingly, does not lend itself to any ruling by the hearing officer on any controverted issues of fact.

THE CASE OF THE PLAINTIFF

Plaintiff's case consisted of his calling himself for direct examination as his only witness (page 286). His testimony was similar to Mr. Clark's, in that it was a principally opinion testimony. Plaintiff first testified concerning his professional background which consisted exclusively of employment with the Michigan Court of Appeals, both within the research

division and as a commissioner, since his graduation from law school in 1972. Following this, the first area considered was what Plaintiff perceived to be the low level of public confidence regarding practicing attorneys (page 288). He also stated that it was his opinion that the State Bar did a poor job of regulating attorneys (page 290) and provided further elaboration of his opinion on that point. Plaintiff also testified that he was Jewish and that the consumption of shellfish and pork violated the dictates of his religion (page 291). This latter point was an apparent reference to his objection stated earlier in a brief in support of his petition, to the expenditure of State Bar funds for cocktail parties in which these items were served.

Cross-examination of the Plaintiff followed Mr. Falk's narrative testimony (page 293). Cross-examination elicited from Mr. Falk an admission that some of his specific criticisms of the State Bar were more directly the fault of the Michigan Supreme Court (page 294), but that the State Bar was wrong in not criticizing the Court for its lenient treatment of judges and lawyers in suspension and disbarment cases.

The Plaintiff in his direct narrative testimony restated for the record all of the objections contained in his petition. Cross-examination by counsel for the State Bar drew from the petitioner one modification of his objections to the various expenditures (page 300), but Plaintiff otherwise stood by his earlier objections (page 301).

There was some exchange between both counsel and the hearing officer about Mr. Falk's qualification to testify as an expert relative to the competency of the practicing Bar (pages 287-289). It was ultimately decided (page 309) that no ruling would be made on Plaintiff's expertise and that he would simply be allowed to testify as to his opinion in the various areas he wishes, and that the weight given to his testimony, if any, would depend upon his background, cross-examination, etc.

EXHIBITS

In addition to the 1977-78 Budget of the State Bar which was an Exhibit in the pleadings already filed, attached hereto are three exhibits. They are as follows:

1. Plaintiff's Exhibit No. 1 consisted of a form letter from the State Bar of Michigan to all its members from former president, Joseph L. Hartig, Jr. [sic — Hardig], urging the members to join LAWPAC, the Lawyers Political Action Committee.

2. Plaintiff's Exhibit No. 2 consisted of a form letter from the Young Lawyers Section of the State Bar to all of its members containing an initiative petition form for the purpose of putting the question of merit selection of judges on the ballot.

3. Plaintiff's Exhibit No. 3 consisted of a list of the 1977-78 Board of Comissioners of the State Bar of Michigan, showing the age of each one of the commissioners, at the present time, as well as their respective ages when they became commissioners.

All exhibits were introduced by the Plaintiff, and all were admitted by stipulation. In terms of testimony concerning the above exhibits, they did not play nearly as prominent a part of the proceedings as did the attached budget. In fact, most of the testimony, both direct and cross-examination, centered around the budget during the two days of hearing.

CONCLUSION

Although there were differences of opinion concerning the role of the State Bar and what it should spend its money for, there were no controverted factual matters as to the amount of these expenditures, and what their purpose was for. Accordingly, the Hearing Officer makes no findings on any controverted factual matters, there being none. The above report is merely meant to assist the Michigan Supreme Court in reviewing the transcript and making a legal determination on the various legal issues raised by Plaintiff in the hearing and in his petition.

EXHIBIT A OF DEFENDANT'S ANSWER TO PETITION FOR SPECIAL RELIEF

STATE BAR OF MICHIGAN
1977-78 BUDGET

REVENUE	
Membership Dues	$1,796,875
Bar Journal	45,600
Miscellaneous Pamphlets	2,500
Michigan Land Title Standards	5,000
Interest	60,000
Insurance Program	7,500
Lawyer Placement Service	1,000
Miscellaneous	20,000
	$1,938,475
EXPENSES	
CENTRAL OFFICE	
Dues Collection & Updating Computer Lists	$ 40,000
Postage	15,000
Printing and Stationery	6,000
Telephone & Telegraph	10,000
Office Supplies	9,000
Salaries & Fees	103,970
Retirement & Payroll Taxes	18,017
Insurance (Life, Hosp. & Dis.)	7,396
Repairs & Maintenance	4,000
Travel	5,250
Machine Rental	4,000
Books, Dues, Subscriptions	3,000
Audit Fees	4,800
Balloting	8,000
Clipping Service	1,600
Building	33,694
Miscellaneous	2,000
	$ 275,727

STATE BAR GRIEVANCE BOARD	
Postage & Printing	$ 12,950
Telephone	6,650
Travel	10,900
Office Supplies	4,000
Rent & Parking	35,975
Salaries	236,020
Retirement & Payroll Taxes	32,896
Insurance (Life, Hosp. & Dis.)	13,244
Witness, Sub. Fees, Court Reporting (net)	28,600
Meetings	2,650
Clipping Service	500
Repairs & Maintenance	1,000
Books, Dues, Subscriptions	3,000
Machine Rental	600
Stenographic Services	600
Miscellaneous	1,500
	$ 391,085

COMMISSIONERS	
Postage & Printing	5,000
Telephone	2,000
Staff	20,842
Travel	12,625
Meetings	5,000
Building	7,580
Miscellaneous	1,000
	$ 54,047

COMMITTEES	
Postage & Printing	$ 12,000
Telephone	1,000
Staff	48,382
Travel	8,375
Meetings	15,000
Legislation (Including Staff Time)	82,501
Books, Dues, Subscriptions	1,000
Michigan Land Title Standards	1,000
Student Assistants	15,000
Revision of Criminal Code	7,100
Children's Charter	1,000
Revision of Criminal Procedure	3,000
Para-Legal Project	5,000
Supreme Court Rules of Evidence	1,000
Law Related Educational Conference	2,500
Building	21,059
Miscellaneous	3,000
	$ 227,917

YOUNG LAWYERS	
Newsletter	$ 6,500
Travel	7,000
Meetings	4,700
Committees	13,550
Publications	6,000
Administration	3,750
	$ 41,500

BAR JOURNAL	
Printing	$ 171,992
Postage	15,100
Addressing & Mailing	5,360
Staff	47,584
Current Law Notes	2,400
Photographs	1,800
Books, Dues, Subscriptions	100
Special Ethics Issue	31,000
Building	5,054
Miscellaneous	100
	$ 280,430
UPPER PENINSULA INSTITUTE	
Postage & Printing	$ 450
Telephone	50
Staff	2,045
Travel & Hotel	1,350
Luncheons & Dinners (net)	450
Speakers' Hotel & Travel	1,000
Building	842
Miscellaneous	250
	$ 6,437
LAW SCHOOL SUMMER INTERN PROGRAM	$ 12,000

ANNUAL MEETING	
Postage & Printing	$ 7,000
Telephone	450
Staff	11,700
Staff Travel	3,000
Luncheons & Dinners (net)	3,000
Speakers	13,000
Office Machine Rental	600
Reception	1,500
Flowers	400
Buses	500
Special Guests	1,500
Displays	(9,000)
Photographs	500
Sound Equipment	1,200
50 Year Pins	900
Exhibition Service	3,500
Rent	3,000
Building	2,527
Miscellaneous	3,000
	$ 48,277

LOCAL BAR LIAISON	$ 20,250

COMMUNICATIONS	
Program & Planning	$ 14,700
Staff	28,376
Law Day	7,850
TV—Detroit & Outstate	8,185
Publications Fund	24,000
Motion Pictures	1,500
Bar Media Awards	3,500
Public Service Spots	5,500
Public Education	40,000
Building	1,685
Miscellaneous	3,208
	$ 138,504
CLIENT SECURITY FUND	
State Bar Allocation	$ 66,900
Staff	8,775
Building	1,685
	$ 77,360
CHARACTER & FITNESS	
Postage & Printing	$ 3,000
Staff	9,243
Building	1,685
	$ 13,928
ABA MEETINGS	
Travel & Meetings	$ 5,000
Staff	6,842
	$ 11,842

LAWYER PLACEMENT SERVICE		
Postage & Printing	$	150
Staff		4,797
Building		2,527
	$	7,474
ICLE		
Appropriation	$	9,600
Annual Meeting		10,000
	$	19,600
PREPAID LEGAL SERVICES		
Contract	$	61,200
Staff		6,842
Building		3,369
	$	71,411
NATIONAL LEGAL AID & DEFENDER	$	2,500
LAWYERS WIVES OF MICHIGAN		
Postage, Printing & Newsletter	$	2,000
Staff		608
Travel		500
Luncheon Meetings		1,500
Hospitality Room—Annual Meeting		500
Law Related Committee		750
Miscellaneous		500
	$	6,358
STATE WIDE LAWYER REFERRAL	$	17,527

REPRESENTATIVE ASSEMBLY	
Postage, Printing & Meetings	$ 7,500
Staff	5,148
	$ 12,648
LAW STUDENT SECTION	$ 4,500
JUDICIAL SECTION	$ 10,000
TOTAL	$1,751,322
CAPITAL EXPENDITURES	
State Bar Grievance Board	$ 4,000
Central Office	22,040
Building	102,817
	$ 128,857
RESERVE FOR DEPRECIATION	$ 25,000
RESERVE FOR FUTURE GRIEVANCE OPERATIONS	$ 25,000
RESERVE FOR FUTURE OPERATIONS	$ 8,296
TOTAL	$1,938,475

Plaintiff's Exhibit 1

STATE BAR OF MICHIGAN

Joseph L. Hardig, Jr., President

Dear Member of the State Bar of Michigan:

This is a critical election year. The Governor and every member of the Michigan Legislature — 38 senators and 110 state representatives — are up for election in 1978. The very nature of our state government and the policies it pursues for the next four years will be shaped in this summer's primary and the November 7 election.

Concerned citizens in all walks of life will be giving financial support to the candidate they consider best qualified. Members of many professional, business, trade and labor groups concerned with public policy will be among those who in this way take an active part in the political process which shapes our government. To make their participation all the more effective, many will do so in an organized way.

If you are concerned with your government's policies and, as a lawyer and as a citizen, you want your voice to be heard, I urge you to join other concerned members of the State Bar by joining or renewing your membership in LAWPAC — the Lawyers Political Action Committee.

Because active membership in the State Bar of Michigan is required as a condition of practice, State Bar funds may not be used for partisan political purposes. LAWPAC is organized as a voluntary association of lawyers dedicated to making the voice of the profession heard through political action.

Recent changes in federal and state campaign finance laws have made it possible for LAWPAC to be organized as a separate, segregated fund of the State Bar, but no State Bar funds can or will be used to finance LAWPAC's work. Every penny of LAWPAC's contributions to candidates and every penny of its administrative costs will come from money voluntarily contributed.

LAWPAC is directed by an executive committee presently consisting of Eugene D. Mossner of Saginaw, Myzell Sowell of Detroit and Donald L. Reisig of Lansing. Don is treasurer of the fund and Carl Smith, Jr., our local bar liaison representative, will serve as the administrator.

Please do not set this letter aside to decide "tomorrow". If it is to be effective, LAWPAC must have your commitment now so that it can make timely commitments of its support. Political action is one of the most important tools available to any constituency to make itself heard in the government process. We urgently need the help of every lawyer who believes that the collective voice of the profession reflects the public interest and *should* be heard.

You can help by sending your check or money order (no corporate checks, please) for $25 (or more if you are so inclined) payable to LAWPAC, to your local bar association LAWPAC chairperson whose name and address appear on the enclosed list, organized by county.

It's up to you. If you want to be heard, let LAWPAC hear from you — NOW!

With warm personal regards,
/s/ Joseph L. Hardig, Jr.
President

Plaintiff's Exhibit 2

YOUNG LAWYERS SECTION
STATE BAR OF MICHIGAN

November 5, 1977

Dear Young Lawyers Section Member:

You no doubt are aware of the statewide effort being made to implement a process of merit selection of candidates for our State Court of Appeals and Supreme Court. Reform of the

judicial election process for the State of Michigan by adoption of the "Missouri Plan" or modified Missouri Plan has been both discussed and debated throughout our State for a number of years.

Mr. George E. Bushnell, Jr., attorney and appointee of Governor Milliken to Chair the State Committee of Diverse Groups concerning the merit selection and/or appointment of the state judiciary, recently addressed the Young Lawyers Section at its October 19, 1977 meeting in Lansing. It was noted by Mr. Bushnell that there have been four prior efforts by the State Bar individually to institute the merit selection of the judiciary. An excerpt from the minutes of the October 19th meeting containing Mr. Bushnell's remarks discussing the present effort and explanation of the proposed legislation is enclosed.

Regardless of whether we individually or collectively agree with the merit selection or appointment of the Judiciary, or agree specifically with the proposed legislation, we each now have the opportunity and responsibility for at least contributing to place this matter on the ballot for a vote by the general state electorate.

A petition drive has been organized by the "Michigan Citizens to Take Partisan Politics Out of the Courts." Again, this effort is merely to place the question on the ballot, and is neither in support nor in opposition to such a plan. The point is: Let's get the issue before the electorate for debate, discussion and voter response.

On behalf of the YLS, I have enclosed a single Initiative Petition Form which sets forth the proposal in full and will accommodate signatures of fifteen registered voters who are residents of the same County, State of Michigan. In this initial petition drive, you are asked to obtain merely the signatures of members of your family, friends, and associates. The deadline date for return of the executed Petition is set for December 1,

1977. All Petitions should be returned no later than December 1, 1977, to:

State Bar of Michigan
Young Lawyers Section
"Petition Initiative"
306 Townsend Street
Lansing, Michigan 48933

In closing, it is once again pointed out that although many individuals of the Section are in favor of the proposal, this effort which requires your prompt assistance does not advocate nor oppose the proposal, but will, if successful in returning the approximately 350,000 required signatures, place the proposed amendment on the ballot for vote by the general electorate.

As members of the Young Lawyers Section of the State Bar, we believe we have a responsibility to make a total positive effort to allow the entire electorate to individually review the proposed amendment and then decide their position on its adoption at the ballot box.

Your thorough reading of the enclosures and cooperation by circulating, completing and returning the Petition to the State Bar by December 1, 1977 is requested. A full return of executed Petitions will speak positively of each of the young lawyers of this State in meeting the task of maintaining an informed and vocal electorate.

Sincerely,
/s/ JOHN E. McSORLEY
Chairperson — Judicial
Selection Committee — YLS

Excerpt From Minutes of State Bar of Michigan
Young Lawyers Section
Meeting of October 19, 1977

Report and Statement of George E. Bushnell, Jr.
On the Coalition to Remove Judiciary from Partisan
Politics (Appointment and Approval of Appellate Judges)

Mr. Bushnell reported that it is the preferance of the State Bar, by vote of the Commissioners, that at least the Appellate Judges for the State of Michigan be selected on a merit process. He announced that Michael L. Donahue, for the State Bar, and John E. McSorley, on behalf of the YLS, have been appointed to distribute, circulate and collect petitions to place this referendum matter on the ballot to all members of the State Bar. A copy of the Petition, with time table letter, will be mailed to each member of the YLS Section. The details of the referendum were announced by Mr. Bushnell as follows: It is the concern of the constituency, not just the Bar, that judicial reform be undertaken for the betterment of the judicial process. It is the feeling of the parent bar that merit selection of Appellate Judges is the first step in this direction.

Mr. Bushnell has been appointed by the Governor to head the State Committee of Diverse Groups concerning the merit selection and/or appointment of all Judges. Mr. Bushnell's Committee is composed of the League of Women Voters, the State Bar Bureau, the State Chamber of Commerce, the State Bar Association, the State Council of Churches, and Common Cause. He announced that there are several organized groups which oppose the merit selection and appointment of judiciary, listing the main groups to be the AFL-CIO, UAW, the Democratic Party and the Republican Party. The State Bar is actively involved in the petition campaign and is requesting the cooperation of YLS. Mr. Stepek thereby indicated that the Section is giving their support and active participation towards

the distribution, collection of signatures and return of petitions to place this matter on the ballot for vote of the electorate. The proposal as defined by Mr. Bushnell is as follows: The Supreme Court and the Court of Appeals, with the exception of present incumbents who would be grandfathered into office, will no longer reach the judiciary by election, but rather by appointment of the Governor. A list of three candidates per position will be submitted to the Governor for appointment. The Governor must select the appointee from that list of three and retains the option to decline any appointment. Such action must be taken within thirty days. Upon failure of the Governor to appoint, the then Chief Judge of the Supreme Court would select a candidate by draw from the nomination of three.

The Nominating Committee will be comprised of representative members throughout the State, to be balanced by geographic location, sex, race, and will be bi-partisan. The Nominating Committee will be a commission of nine, comprised of six laymen and three lawyers. There will be no more then five members of any one political party, and all members of the Commission will be appointed by the Governor, which will require Senate approval. The terms of the Nominating Committee can serve while in State public office, and each will be limited to two terms of three years apiece.

The judicial candidate once nominated by the Committee must then run in the next general election on the question whether that judge should be retained. The terms of appointment will be six years for the Court of Appeals and eight years for the Supreme Court. The appointed and approved number of the judiciary will then run in a retention election at the expiration of its term and the terms will be limited to four terms for the Court of Appeals and three terms for the Supreme Court.

Mr. Bushnell indicated that there had been four prior efforts by the Bar alone to institute the merit selection of the judiciary, such effort going towards the appellate as well as the trial

level. As to the petitions, the only restrictions are that all signers be voters from the same County on any one petition. All petitions must be turned in by April 1st. However, in the initial effort which involves return of petitions from State Bar Members, such petitions will be due by December 15, 1977 (now, December 1, 1977). In order to place the referendum on the ballot, the collection of signatures from petitions must equal five percent of the vote for Governor in the last general election, which is approximately 350,000 signatures.

The manner in which an individual will make known his desire to be appointed or run for the judiciary will be the same as it is now. The person desiring appointment will submit his name to the Governor or to the Nominating Committee.

BEST AVAILABLE COPY

INFORMATION FOR CIRCULATORS

1. In offering the petition for signature, make sure that the signer is from the county designated on the petition.
2. It is likely that one of the following two things will happen in soliciting petition signatures:
   a. The signer will trust the circulator sufficiently, and will accept a response of "this petition will help make our courts better" in order to generate the signature; or
   b. The signer will request more information regarding the petition.
3. If more information is required, the circulator should suggest that the basics of the constitutional amendment can be found on the back of the petition flyer.
4. If that explanation is insufficient, offer the brochure as an incentive for further understanding.
5. If there is still a lack of comprehension and a reluctance to sign, suggest again that this is a program to take politics out of the courts, and that his or her signature will merely help to qualify this question for the November 1978 ballot.
6. Also suggest that much debate and discussion will ensue concerning this issue between now and November of 1978. During this period of time greater elaboration and comprehension of the issue will be provided.
7. DO NOT ARGUE OR DEBATE THE MERITS OF THE PROPOSAL. Try only to obtain the signature as quickly as possible, while answering all questions as honestly as you can.
8. DON'T TRY TO BE AN EXPERT. Let the petition and the brochure speak to the issue.
9. Remember to sign and date the petition before you turn it in, regardless of how many signatures are on it.

INITIATIVE PE
AMENDMENT TO THE

CITY OF ☐ TOWNSHIP OF ☐	7
CITY OF ☐ TOWNSHIP OF ☐	8
CITY OF ☐ TOWNSHIP OF ☐	9
CITY OF ☐ TOWNSHIP OF ☐	10
CITY OF ☐ TOWNSHIP OF ☐	11
CITY OF ☐ TOWNSHIP OF ☐	12
CITY OF ☐ TOWNSHIP OF ☐	13
CITY OF ☐ TOWNSHIP OF ☐	14
CITY OF ☐ TOWNSHIP OF ☐	15

CERTIFICATE OF CIRCULATOR

I, the circulator of this petition, assert that I am qualified to circulate this petition, that each signature on the petition was signed in my presence, that to my best knowledge and belief each signature is the genuine signature of the person purporting to sign the same and that the person was at the time of signing a qualified registered elector of the city or township indicated preceding the signature and that the elector was qualified to sign the petition.

WARNING — Any circulator knowingly making a false statement in the above certificate or any person not a circulator who signs as such or any person who signs a name other than his own

CIRCULATOR — Do not sign or date certificate until after circulating petition.

SIGNATURE OF CIRCULATOR DATE

(CITY OR TOWNSHIP WHERE REGISTERED)

COMPLETE ADDRESS (STREET AND NUMBER OR RURAL ROUTE)

Plaintiff's Exhibit 3

STATE BAR OF MICHIGAN

June 5, 1978

306 Townsend Street
Lansing, Michigan 48933
Telephone (517) 372-9030

1977-1978 BOARD OF COMMISSIONERS
*Indicates Supreme Court Appointee at-Large

		Age	Now
1.	Dennis W. Archer, Detroit	36	34
2.	Ivan E. Barris, Detroit	50	44
3.	Joel M. Boyden, Grand Rapids	41	37
4.	James C. Daner, Mt. Clemens	59	45
* 5.	Julia D. Darlow, Detroit	36	36
6.	Edmond F. DeVine, Ann Arbor	61	59
7.	Leo A. Farhat, Lansing	52	44
8.	Hon. Ralph B. Guy, Jr., Detroit	48	45
9.	William P. Hampton, Farmington Hills	40	39
10.	Joseph L. Hardig, Jr., Birmingham	50	41
11.	Daniel J. Henry, Jr., Grosse Pointe	36	35
*12.	Hon. R. Stuart Hoffius, Grand Rapids	63	57
13.	Patrick J. Keating, Detroit	50	43
14.	John A. Krsul, Jr., Detroit	40	35
15.	Robert E. LeMire, Escanaba	64	58
16.	Dean S. Lewis, Kalamazoo	44	36
17.	Arnold W. Lungrshausen, Detroit	70	61
*18.	Barbara B. MacKenzie, Petoskey	49	47
19.	Patrick A. McDonald, Detroit	42	40
20.	Eugene D. Mossner, Saginaw	48	42
21.	George T. Roumell, Jr., Detroit	49	46

*22.	Charles R. Rutherford, Detroit	49	40
23.	Hon. Gene Schnelz, Walled Lake	45	40
*24.	Myzell Sowell, Detroit	53	46
25.	Daniel T. Stepek, Mt. Clemens	34	34
26.	John M. Wright, Flint	54	51

Mich. Comp Laws §600.901 (1979) State Bar membership; public body corporate.

Sec. 901. The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

Mich. Comp Laws §600.904 (1979) Same; regulation by supreme court.

Sec. 904. The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

Mich. Comp Laws §600.907 (1979) Same; subpoena, administration of oaths.

Sec. 907. The state bar of Michigan has the power of subpoena, and the authority to take testimony under oath, which may be exercised by its officers, boards and committees for the purpose of aiding in cases of discipline, suspension, and

disbarment of its members, and in cases of applicants for admission to the bar, under such regulations and restrictions as the supreme court may prescribe. The persons exercising the power granted by this section have the power to administer the necessary oaths.

RULE 1
STATE BAR OF MICHIGAN

The State Bar of Michigan is the association of the members of the bar of this State, organized and existing as a public body corporate pursuant to powers of the Supreme Court over the bar of the State. The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State.

RULE 2
MEMBERSHIP

Those persons who are licensed to practice law in this State on December 2, 1935, and those who shall become licensed thereafter to practice law in this State, shall constitute the membership of the State Bar of Michigan subject to the provisions of these rules. Law students may become law student section members of the State Bar of Michigan. None other than a member's correct name shall be entered upon the official register of attorneys of this State. Each member shall file promptly with the State Bar of Michigan a statement setting forth his correct name, his business and residence addresses, and such additional information as may be required. No member shall practice law in this State until such statement is filed. Members shall notify the State Bar of Michigan promptly in writing of any change of name, or business or residence address. The State Bar of Michigan shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a

member to alter or change his name. The name and address on file with the State Bar of Michigan at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by him in the practice of law or in a judicial election or in an election for any other public office.

RULE 3
MEMBERSHIP CLASSES

(a) Active.

A person engaged in the practice of law in Michigan must be an active member of the State Bar. In addition to its traditional meaning, the term "person engaged in the practice of law" in this rule includes a person licensed to practice law in Michigan or another jurisdiction and employed in Michigan in the administration of justice or in a position which requires that the person be a law school graduate, but does not include (1) a judicial law clerk who is a member or is seeking to become a member of the bar of another jurisdiction and who does not intend to practice in Michigan after his clerkship ends, or (2) an instructor in law. Only an active member may vote in a State Bar election or hold a State Bar office. A person not an active member who engages in the practice of law is subject to discipline or prosecution for unauthorized practice.

(b) Inactive.

An active member may request an inactive classification. He may later be classified as an active member by

(1) applying to the State Bar secretary;

(2) paying the annual dues;

(3) demonstrating that no disciplinary action has been taken or is currently pending against him in another jurisdiction; and

(4) if he was inactive for 3 years or more, obtaining a certificate from the Board of Law Examiners that he

currently possesses sufficient ability and learning in the law to enable him to properly practice as an attorney and counselor in Michigan.

If the inactive member has been or is currently subject to disciplinary action in another jurisdiction, the application must be referred to the Attorney Discipline Board and action on the application delayed until the board makes a decision.

(c) Law Student.

A student in good standing at a law school approved by the Board of Law Examiners or the American Bar Association may be a member of the law student section.

RULE 4
MEMBERSHIP DUES

(a) An active member's dues for each fiscal year (October 1 through September 30), payable at the State Bar's principal office by October 1st of each year, are:

(1) $150, for a member admitted to practice 3 years or more (counting the fiscal year in which admission took place as a full year), admitted from another jurisdiction, or admitted under Board of Law Examiners Rule 5(D);

(2) $90, for a member admitted to practice less than 3 years. For the fiscal year of admission, dues are $90 if admitted between October 1 and March 31, and $45 if admitted between April 1 and September 30.

(b) Dues notices must be sent to all active members before September 20. A 10 percent late charge is added to a dues payment postmarked after November 30. The State Bar must send a written notice of delinquency (by registered or certified mail to the last recorded business address) to a member who fails to pay his dues by November 30. If the dues and the late charge are not paid within 30 days after the notice is sent, the individual is suspended from active membership in the State Bar. If an individual is not subject to a disciplinary order and the suspension is for less than 3 years, he is automatically

reinstated on the payment of dues and late charges owing from the date of his suspension to the date of his reinstatement. If the suspension is for 3 years of more, the individual must apply for recertification under Rule 8 for the Board of Law Examiners.

(c) An active member does not have to pay dues after he becomes 70.

(d) Annual dues for Law Student Section members are established annually by the Board of Commissioners and payable at the State Bar's principal office by October 1st of each year.

(e) All dues are paid into the State Bar treasury and constitute a fund to pay expenses authorized by the Board of Commissioners.

RULE 5
BOARD OF COMMISSIONERS

Section 1. Powers, Functions, and Duties.

(a) The Board of Commissioners shall

(1) implement policy adopted by the assembly;

(2) establish policy for the State Bar between assembly meetings not inconsistent with prior action of the assembly;

(3) manage the State Bar, adopt a budget for it, and supervise receipt and disbursement of State Bar funds;

(4) prescribe the function and duties of committees;

(5) provide for the organization of sections (including a law student section) of the State Bar, membership in which is voluntary, and determine the amount and regulate the collection and disbursement of section dues;

(6) receive and review committee and section reports and recommendations proposing action by the board and take interim or final action that the board finds feasible, in the public interest, and germane to the functions and purposes of the State Bar; and

(7) arrange for the publication of a journal to be issued at least 4 times a year and sent to the active members without charge.

(b) The Board of Commissioners may

(1) adopt bylaws;

(2) appoint standing and special committees, including

(A) character and fitness,

(B) civil procedure,

(C) court administration,

(D) criminal jurisprudence,

(E) fiscal,

(F) grievance,

(G) judicial qualifications,

(H) legal education,

(I) legislation,

(J) professional and judicial ethics,

(K) scope and correlation, and

(L) unauthorized practice of law;

(3) at the request of the governor, the legislature, or the supreme court, or on its own initiative, conduct an investigation of any matter relating to the state's courts or tribunals, to the practice and procedure in them, or to the administration of justice, and report to the officer or body making the request;

(4) acquire and hold real and personal estate by lease, purchase, gift, devise, or bequest, and sell, convey, mortgage, pledge, or release property;

(5) borrow money and pledge for repayment in annual installments, in anticipation of future revenues from annual membership dues, and issue notes, but the total indebtedness outstanding may not at any time exceed 40 percent and the principal installment due in one year may not exceed 8 percent of the revenues from required annual membership dues for the 5 preceding fiscal years;

(6) accept and hold real and personal estate in trust for any

use or purpose germane to the general functions and purposes of the State Bar;

(7) bring an action or proceeding at law or in equity in a state or federal court or tribunal and intervene and be heard on an issue involving the membership or affairs of the State Bar in an action or proceeding pending in a state or federal court or tribunal.

(c) The board may assign these powers, functions, and duties to another State Bar agency but the board may reverse or modify the exercise or a power, function, or duty by a delegated agency.

Section 2. Membership terms. The board consists of:

(1) 19 elected members, each serving a 3-year term;

(2) 5 members appointed by the supreme court, each serving a 4-year term;

(3) the chairperson and immediate past chairperson of the State Bar young lawyers section, each serving for the years during which they hold those positions;

(4) the chairperson and clerk of the assembly, each serving for the year during which they hold those positions.

Section 3. Election Districts; Apportionment.

The board shall establish commissioner election districts consisting of contiguous judicial circuits and containing, as nearly as practicable, an equal lawyer population. The largest geographic area may have the highest deviation from population equality.

The board shall review and revise election districts every 6 years. If, as the result of a revision in election districts, no elected commissioner maintains his principal office in a district or a district has fewer elected commissioners than it is entitled to, the board may designate an elected commissioner or commissioner at large for the district until the next annual election when the vacancy will be filled.

To provide for an orderly transition and to preserve the requirement that approximately one-third of the elected board

members are elected each year, the board may extend the term of an elected commissioner for a period not exceeding one year and the authorized membership of the board will be enlarged for the period affected.

An elected commissioner whose district is merged with another district as the result of a revision of commissioner election districts may nevertheless serve the full term for which he was elected and the authorized membership of the board will be temporarily enlarged for that purpose.

Section 4. Nomination and Election of Commissioners.

A commissioner is elected by the active members having their principal offices in the election district. To be nominated, a member must have his principal office in the election district and file a petition signed by at least 5 persons entitled to vote for the nominee with the secretary at the principal office of the State Bar between May 1 and May 31. Voting eligibility is determined annually on June 1. Before June 25, the secretary shall mail a ballot to everyone entitled to vote. A ballot will not be counted unless marked and returned to the secretary at the principal office of the State Bar in a sealed envelope bearing a postmark date not later than midnight July 7. A board of 3 tellers appointed by the president shall canvass the ballots, and the secretary shall certify the count to the supreme court clerk. A member or a candidate for the board may not be a teller. The candidate receiving the highest number of votes will be declared elected. In the case of a tie vote, the tellers shall determine the successful candidate by lot. In an election in which terms of differing length are to be filled, the successful candidate with the lowest vote shall serve the shortest term to be filled.

Section 5. Vacancies.

The board shall fill a vacancy among the elected commissioners and the supreme court shall fill a vacancy among the appointed commissioners, to serve the remainder of an expired term. If an elected commissioner moves his principal office out

of his election district, the board shall declare that a vacancy exists.

Section 6. Meetings.

The board shall meet during the annual meeting of the State Bar and before the convening of the assembly and shall hold not less than 4 meetings each year. The interval between board meetings may not be greater than 3 months. A special meeting may be held at the president's call and must be held at the secretary's call at the request of three or more board members. At a meeting, a majority of the board constitutes a quorum.

Section 7. Voting.

Each member of the board may cast only one vote. Voting by proxy is not permitted.

RULE 6
REPRESENTATIVE ASSEMBLY

Section 1. Powers, Functions, and Duties.

The Representative Assembly is the final policy-making body of the State Bar. If the State Bar petitions to increase its dues, the Representative Assembly must authorize it.

Section 2. Membership, Officers.

The assembly consists of:

(1) 130 elected representatives;

(2) 12 representatives appointed by the supreme court to represent segments of the profession not otherwise fully represented, including active members not located in Michigan; and

(3) 8 commissioner representatives who are the members of the executive committee of the Board of Commissioners.

Section 3. Election Districts; Apportionment.

The assembly shall apportion the representatives every 6 years. The judicial circuits are the election districts. Each judicial circuit is entitled to one representative. The remaining seats are to be apportioned among the circuits on the basis of

lawyer population, determined on February 1 of the reapportionment year.

Section 4. Nomination and Election of Representatives.

A representative is elected by the active members having their principal offices in a judicial circuit. To be nominated, a member must have his principal office in the judicial circuit and file a petition signed by at least 5 persons entitled to vote for the nominee with the secretary at the principal office of the State Bar between May 1 and May 31. Voting eligibility is determined annually on June 1. Before June 25, the secretary shall mail a ballot to everyone entitled to vote. When an assembly member seeks reelection, the election notification must disclose his incumbency and the number of meetings of the assembly that the incumbent has attended in the following form:

"has attended _____ of _____ meetings during the period of [his or her] incumbency." A ballot may not be counted unless marked and returned to the secretary at the principal office of the State Bar in a sealed envelope bearing a postmark date not later than midnight July 7. A board of tellers appointed by the president shall canvass the ballots and the secretary shall certify the count to the supreme court clerk. A member or candidate for the assembly may not be a teller. The candidate receiving the highest number of votes will be declared elected. In case of a tie vote, the tellers shall determine the successful candidate by lot. An election will occur in each judicial circuit every 3 years, except that in a judicial circuit entitled to 3 or more representatives, one-third will be elected each year. If a short-term representative is to be elected at the same election as a full-term one, the member with the higher vote total is elected to the longer term.

Section 5. Terms.

An elected representative or a representative appointed by the supreme court shall serve a 3-year term beginning with the annual meeting following his election or appointment and

until his successor is elected or appointed. A representative may not continue to serve after he completes two successive 3-year terms.

Section 6. Vacancy.

If an elected representative moves his principal office out of the judicial circuit he represents, the chairperson shall declare that a vacancy exists. If an elected or appointed representative does not attend two consecutive meetings of the assembly without having previously been excused by the chairperson because of a personal or professional emergency, or does not attend three consecutive meetings of the assembly for any reason, the chairperson shall declare that a vacancy exists. The assembly may appoint a lawyer to a vacant seat of an elected representative. The remaining representatives from the affected judicial circuit or, if there are none, the State Bar-recognized local bar associations in the affected judicial circuit, shall nominate a successor. There will be an election for the unexpired term at the next annual election of representatives. The interim appointment ends when the secretary certifies the election count, and the person elected shall take his seat immediately. The supreme court shall fill vacancies in the seats of appointed representatives.

Section 7. Meetings.

The assembly shall meet:

(1) during the annual meeting of the State Bar;

(2) annually in January and May; and

(3) at any other time and place it determines.

A special meeting may be called by the Board of Commissioners and must be called by the chairperson on the written request of a quorum of the Representative Assembly. Fifty members constitute a quorum. The chairperson of the assembly presides at all of its meetings. The assembly may adopt rules and procedures for the transaction of its business not inconsistent with these rules or the bylaws of the State Bar. A

section chairperson is entitled to floor privileges without a vote when the assembly considers a matter falling within the section's jurisdiction.

Section 8. Voting.

Each member of the assembly may cast only one vote. Voting by proxy is not permitted.

RULE 9
DISBURSEMENTS

The Board of Commissioners shall make the necessary appropriations for disbursements from the funds of the treasury to pay the necessary expenses of the State Bar of Michigan, its officers and committees. It shall be the duty of the board to cause proper books of account to be kept and to have them audited annually by a certified public accountant. At each annual meeting the Board shall cause to be presented a financial statement showing the receipts and expenditures of the State Bar of Michigan. Such statement shall also be filed with the Clerk of the Supreme Court and shall be published in the official publication of the State Bar of Michigan preceding the date of the annual meeting.

No officer, member of the Board of Commissioners, member of the Representative Assembly, or member of a committee or section of the State Bar of Michigan shall receive compensation for services rendered in connection with the performance of his duties. They may, however, be reimbursed for the necessary expenses incurred in connection with the performance of their duties.

BYLAWS OF THE STATE BAR OF MICHIGAN
ARTICLE IX
PUBLIC STATEMENTS

No Section, Section council or Committee or member thereof shall assume to represent the State Bar of Michigan before any legislative body, in any court or before any other tribunal unless authorized to do so by the Board of Commissioners.

No report, or recommendation or any action of any Section or council thereof, or of any Committee of the State Bar of Michigan, shall be considered as the action of the State Bar of Michigan, unless and until it has been approved by the Board of Commissioners or the Representative Assembly in accordance with these Rules and Bylaws. Reports, recommendations, or other actions of any Section, Section council or Committee of the State Bar of Michigan not inconsistent with policy adopted by the Board or Assembly may be released, announced or published as the action of such Section, Section council or Committee only when it is determined by the Executive Director of the State Bar of Michigan that:

(a) The report is germane to the purpose of the Section, Section council, or Committee;

(b) The report has been made by a majority of the full membership of the Section, Section council or Committee after notice to the members thereof;

(c) The report reveals that notice was given and the vote on the matter;

(d) The report indicates in a form approved by the Executive Director that it is the action of the Section, Section council or Committee only and does not represent the view or action of the State Bar of Michigan unless and until the Board of Commissioners or Representative Assembly shall have taken an approving action with respect thereto in accordance with the Rules and Bylaws.